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ROYAL COMMISSION



*Inquiry
into
Civil Rights*

REPORT No. 1

VOLUME 2



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Ontario Royal commission of inquiry
into Civil Rights

Report 1968

Volume 2



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Page 1

311

Cap. 1

ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS

REPORT NUMBER ONE

VOLUME 2

1968

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PART II

ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE IN THE PROVINCE

INTRODUCTION

Four general propositions necessarily follow from the premise, emphasized throughout this Report—the courts of justice presided over by an independent judiciary must be and continue to be the ultimate guardians of the civil rights of the individual. The propositions are:

1. No legislation should ever be passed that will entirely remove the protective shield of the civil rights of the individual which is furnished by the courts of justice.
2. Reasonable and ready access to the courts should be available to every person to the end and that he should receive a just and expeditious decision on any matter within the jurisdiction of the courts.
3. It is essential that in the exercise of their supervisory power over lesser tribunals the courts should function to provide judicial direction to, and not legislative interference with the powers committed to, those lesser tribunals.
4. In attempting to achieve the best possible result in terms of the protection and welfare of society, the administration of justice in criminal matters demands that every proper protection be afforded to the accused without discrimination or oppression, and that justice must not only be done at all times but must manifestly appear to be done.

The first proposition emphasizes that basically the Legislature should never sanction the exercise of arbitrary power. This must be so regardless of the subject matter and the circumstances out of which the dispute may arise and the elementary common law rights of judicial review should always remain unless an adequate right of appeal to an independent judicial tribunal is provided.

If the courts are properly to fulfil their role as the guardians of the civil rights of the individual, several conditions arising out of the second, third and fourth propositions must be met:

(a) Properly qualified judicial officers, with safeguards to insure their competency on appointment and continuing competency;

(b) Properly qualified and competent court officers and internal staff; adequate and dignified court accommodation and other facilities; proper and accurate court records, including efficient court reporting;

(c) All practical access of a litigant or an accused to the courts and reasonable protection without discrimination or oppression. There should be:

(i) provision for an adequate system of legal aid;

(ii) rights of appeal or judicial review;

(iii) elimination of unnecessary or arbitrary powers of arrest or seizure and the substitution of other processes where practicable;

(iv) no unnecessary detention after arrest;

(v) no unnecessary delay in holding trials or in hearing appeals;

(vi) procedures whereby an accused may be released on bail or other process in proper cases with a minimum of delay;

(vii) no order for bail in excess of that which is necessary in the circumstances to assure the attendance of the accused in court.

(d) Proper provision for the comfort, convenience and financial compensation of those assisting in the administration of justice in the capacity of witnesses and jurors;

(e) Compensation for injuries sustained by those who voluntarily or on request of police officers assist in affecting arrests;

(f) The principle that an accused should be deemed innocent until the contrary is proven must be affirmed in practice as well as in theory. There should be no statutory provision

which shifts the onus of proof or disproof to the accused, except where it can be clearly demonstrated that such a provision is essential to the administration of justice;

(g) Proper distribution of the judicial resources available, with adequate supervision to mitigate as far as possible delays in the administration of justice in any part of the province.

These propositions must be considered in relation to certain constitutional boundaries that limit the powers of the Ontario Legislature to exercise complete control over the procedure in the courts in addition to those discussed in Chapter 2 of this Report.¹ Under the B.N.A. Act "the administration of justice in the province including the constitution, maintenance and organization of the provincial courts both of civil and criminal jurisdiction and including procedure in civil matters in those courts" is within the exclusive power of the Legislature of the Province.²

On the other hand it is the Parliament of Canada that has exclusive jurisdiction to make laws relating to the criminal law (other than the constitution of the courts of criminal jurisdiction), including the procedure in criminal matters.³

A legislature in each province "may exclusively make laws in relation to . . . [t]he imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects. . . ." ⁴ committed to the jurisdiction of the provinces.

The area of criminal law is ill-defined and in every case the pith, substance and purpose of the legislation in question must be examined.⁵ It is nevertheless clear that for the purposes of enforcing laws that come within the jurisdiction of the legislature, the legislature of the province has jurisdiction to enact prohibitions and provide for penalties for breaches of the prohibitions.⁶

¹See pp. 32 ff. *supra*.

²B.N.A. Act, s. 92(14).

³*Ibid.*, s. 91(24).

⁴*Ibid.*, s. 92(15).

⁵*O'Grady v. Sparling*, [1960] S.C.R. 804.

⁶*Hodge v. The Queen* (1883), 9 A.C. 117; *Qwong Wing v. The King* (1914), 49 S.C.R. 440.

While the Parliament of Canada has the sole jurisdiction to make laws relating to "criminal procedure", the Legislature of the province has the sole jurisdiction to provide for the procedure by which provincial prohibitions and penalties for their breach are to be enforced. This includes powers of arrest, bail, trial, and appeals.

The province is solely responsible for the constitution, maintenance and organization of the provincial courts for the purpose of administering both civil and criminal justice,⁷ but Parliament has jurisdiction to provide for a general court of appeal for Canada and for the establishment of additional courts for the better administration of the laws of Canada.⁸ Pursuant to this jurisdiction the Supreme Court of Canada has been established to which appeals lie from the highest court of final resort in a province.⁹ We are not concerned with the power to create federal courts in areas of law coming solely within the federal jurisdiction.

From what we have said, and what we shall say, it will be evident that the administration of criminal justice in the Province is a complex matter. No useful purpose will be served by entering upon a discussion of the decisions of the courts which have from time to time determined where the lines should be drawn, with respect to federal and provincial jurisdiction in criminal matters.¹⁰ Wherever the line may be drawn there exists a large area of provincial penal jurisdiction about which there can be no debate. Unquestionably the province can create offences in aid of the enforcement of laws enacted within its legislative jurisdiction. We shall refer to these as provincial offences. All offences are either indictable offences or offences punishable by summary conviction which, for convenience, we shall refer to as summary offences. Indictable offences are only created by the Parliament of Canada, while summary offences are created by either Parliament or by the legislatures of the provinces.

⁷B.N.A. Act, s. 92 (14).

⁸*Ibid.*, s. 101.

⁹R.S.C. 1952, c. 259, s. 37.

¹⁰See *Proprietary Articles Trade Association v. Attorney General of Canada*, [1931] A.C. 310; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396.

TRIALS

The procedure for the trial of indictable offences and summary offences created by Parliament is laid down by Parliament in the Criminal Code. The Ontario Legislature has power to define its own procedure for the trial of provincial offences but in large measure, though not entirely, it has adopted the procedure provided by Parliament for the trial of summary offences created by Parliament.¹¹

All summary offences are tried by a magistrate or a justice of the peace. The procedure in relation to the trial of indictable offences is much more complex.

A judge of the Supreme Court of Ontario, sitting in assizes, that is with a jury, has jurisdiction to try all indictable offences. A Supreme Court judge in Ontario has no jurisdiction to try an accused without a jury, even with his consent, except in the case of a corporation charged under the Combines Investigation Act.¹² A small number of indictable offences must be tried in the Supreme Court. Examples are: treason, murder, attempted murder, manslaughter and rape.¹³ A county or district court judge, sitting in the General Sessions of the Peace, i.e., with a jury, has jurisdiction to try all indictable offences, except that limited number which must be tried in the Supreme Court.¹⁴ With the consent of the accused a county or district court judge has jurisdiction to try without a jury all offences which he has jurisdiction to try with a jury.¹⁵

A magistrate may try with the consent of the accused all indictable offences except those within the exclusive jurisdiction of the Supreme Court.¹⁶ The Attorney General of the province may, however, notwithstanding that the accused has elected to be tried by a magistrate or by a county or district court judge, require that the accused be tried before a judge and jury for any indictable offence punishable by imprisonment for more than five years.¹⁷ There are a

¹¹Summary Convictions Act, R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1.

¹²Can. 1960, c. 45, s. 17.

¹³Crim. Code, s. 413.

¹⁴*Ibid.*, ss. 468 (2), 477.

¹⁵*Ibid.*

¹⁶*Ibid.*, ss. 467, 468.

¹⁷*Ibid.*, ss. 480, 487.

limited number of offences that may be treated either as summary offences or indictable offences at the instance of the Crown, e.g. driving a motor vehicle while intoxicated,¹⁸ and a limited number of indictable offences that may be tried by a magistrate without the consent of the accused,¹⁹ e.g., theft of a sum of money not over \$50. In approximately 52% of the cases the accused charged with an indictable offence elects to be tried by the magistrate. The magistrate may refuse to accept the election and conduct a preliminary inquiry, as is done where the accused elects to be tried by a county or district court judge or by a jury. The inquiry is to determine whether there is sufficient evidence to warrant a committal for trial.

If the accused elects trial by a judge and jury he cannot be put on trial until a bill of indictment has been submitted to a grand jury and a true bill has been returned in respect of the charge or charges alleged. The grand jury sits in secret session. If it returns a no bill the accused must be discharged.²⁰ A preliminary hearing and committal for trial is not essential to a trial by judge and jury. The Attorney General or anyone on his behalf without consent of the judge, or anyone with consent of the judge, may prefer a bill of indictment before a grand jury without a preliminary hearing, even though the accused may have been discharged on a preliminary hearing in respect of the same charge; or a court constituted with a grand jury may order that an indictment be preferred before the grand jury of that court.²¹

An assize court—a Supreme Court judge sitting with a jury—is also a court of general gaol delivery. Where a prisoner has been committed for trial and is in custody awaiting trial, an indictment must be preferred against him at the first sittings of a court having jurisdiction to try him, unless he has elected to be tried without a jury. This is a supervisory jurisdiction exercised by the Supreme Court to guard against the detention in custody of prisoners without trial for longer than is necessary. We shall discuss the proper exercise of this jurisdiction in due course.

¹⁸*Ibid.*, s. 222.

¹⁹*Ibid.*, s. 467.

²⁰The procedure is fully discussed in Chapter 50 *infra*.

²¹Crim. Code, s. 487.

So much for the general framework of trials of summary offences and indictable offences. All these matters of jurisdiction and procedure will be more elaborately considered when we deal with the respective courts.

APPEALS

A clear distinction must be drawn between an appeal from a conviction for a summary offence and a conviction for an indictable offence.

Summary Offences

Summary offences, whether federal or provincial, may be considered together. Except for certain provincial liquor offences, the method of appeal is in large part substantially the same in both cases. Under the Summary Convictions Act²² the federal procedure has been substantially adopted.

Two methods of appeal are available from a conviction for a summary offence:

- (1) An appeal by way of a stated case to a judge of the Supreme Court on a question of jurisdiction or law;
- (2) An appeal to a county or district court judge on any question of law or fact.

Where an appeal is by way of stated case, the court is confined to the matter set out in the case stated and the appellant is precluded from thereafter appealing to a county or district court judge. On an appeal to a district or county court judge a trial *de novo* is held, except in cases under the Liquor Control Act and the Liquor Licence Act. A trial *de novo* is a completely new and independent trial in every respect unless, by consent, the parties agree to abide by the record of the evidence at the original trial before the magistrate or justice of the peace. The parties may adduce whatever evidence they wish from whatever witnesses they may wish to call, whether or not these witnesses were called at the trial. Under the Liquor Control Act and the Liquor Licence Act, appeals are heard in the first instance by the county or district court judge on the basis of the trial record, that is, on the evidence and proceedings taken at the trial.

²²R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1.

Since an appeal by way of trial *de novo* may become, in effect, the real trial, the trial before the magistrate may be treated by the parties merely as an examination for discovery in preparation for the trial before the county court judge. On such an appeal, as the law now stands, the prosecution and the accused have equally comprehensive rights of appeal, the accused being entitled to appeal any conviction or sentence, and the prosecution any dismissal or sentence.²³

Whether an applicant proceeds by way of a stated case before a Supreme Court judge or by way of trial *de novo* before a county or district court judge, a further appeal lies in each case to the Court of Appeal, with leave of the Court of Appeal, on any ground that involves a question of law alone.²⁴ And in each case a further appeal lies from the Court of Appeal to the Supreme Court of Canada, with leave of the Supreme Court, on any question of law or jurisdiction relating to a conviction or acquittal which has been determined on the merits by the Court of Appeal.²⁵ No appeal lies to the Supreme Court of Canada from a decision of the Court of Appeal refusing leave to appeal from a decision of the county court judge on a trial *de novo*,²⁶ nor does an appeal lie to the Supreme Court of Canada on a question of sentence.²⁷

Appeals from Conviction on Indictment

An appeal lies directly to the Court of Appeal from conviction on indictment in all cases. Unlike summary conviction appeals, the appeal is on the record but the Court of Appeal has power, "where it considers it in the interests of justice", to hear further evidence. In contrast to summary conviction appeals, the right of appeal of the Crown is more circumscribed than that of the accused. The latter has an absolute right of appeal from a conviction on any ground of appeal that involves a question of law alone, and with leave of the Court of Appeal he may appeal from a conviction on

²³Crim. Code, s. 720 (a)(b).

²⁴*Ibid.*, s. 743(1).

²⁵Supreme Court Act, R.S.C. 1952, c. 259, s. 41(1)(3).

²⁶*Paul v. The Queen*, [1960] S.C.R. 452.

²⁷*R. v. Alepin Frères Ltée.*, [1965] S.C.R. 359.

any other ground, as well as his sentence.²⁸ On the other hand, the Crown may only appeal from an acquittal on the sole ground of an error in law. Like the accused, the Crown may appeal a sentence with leave of the Court of Appeal or a judge thereof.²⁹

Appeals to the Supreme Court of Canada from Conviction on Indictment

A person who has been sentenced to death has a right of appeal on questions of law, fact, or mixed law and fact, to the Supreme Court of Canada from the judgment of the Court of Appeal affirming his conviction, and likewise a person whose acquittal has been set aside on a charge punishable by death has a similar right of appeal to the Supreme Court of Canada.³⁰ In all other cases the Crown and the accused have a right of appeal to the Supreme Court of Canada on any question of law on which a judge of the Court of Appeal dissents or, with leave of the Supreme Court, on any question of law. In addition, an accused has a right of appeal to the Supreme Court on a question of law where the Court of Appeal has set aside an acquittal by the trial court, but, where a conviction has been set aside, the Crown can appeal only if there is a dissent in the Court of Appeal, or with leave of the Supreme Court of Canada.³¹ No appeal lies to the Supreme Court of Canada by either the Crown or the accused on a question of sentence.³²

CONSTITUTION OF THE COURTS

It is useful here to make a brief reference to the constitution of the criminal courts. Section 96 of the British North America Act provides: "The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province. . . ." In Ontario the "Superior Court" is the Supreme Court of Ontario, consisting of two branches, the Court of Appeal and the High Court of Justice for Ontario.

²⁸Crim. Code, s. 583(a)(b).

²⁹*Ibid.*, s. 584.

³⁰*Ibid.*, s. 597A.

³¹*Ibid.*, ss. 597 (1)(2), 598 (1).

³²*Goldhar v. The Queen*, [1960] S.C.R. 60.

All judges of the Court of Appeal are *ex officio* judges of the High Court of Justice, and all judges of the High Court of Justice are *ex officio* judges of the Court of Appeal. Accordingly all Supreme Court judges in the province and all county and district court judges must be appointed by the Governor General on the recommendation of the federal government, which is responsible for the payment of the salaries, allowances and pensions of these judges.³³

On the other hand, as has been pointed out, exclusive authority is given to the province to provide for "The Administration of Justice in the Province including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction. . . ."³⁴

Since the province has power to constitute and create provincial courts but no power to appoint Supreme, county or district court judges thereto, it must have the co-operation of the federal government to expand the facilities of the administration of justice in the Supreme Court and the county and district courts.

As we have pointed out elsewhere, the provisions of section 96 of the B.N.A. Act operate as a limitation on the power of the province to confer jurisdiction on provincial tribunals.³⁵ However, the province has authority not only to create courts other than Supreme and county or district courts but to appoint the judges to preside in them. Such courts include division courts—small debt courts—surrogate courts, family courts, juvenile courts, magistrates' courts and courts presided over by justices of the peace. Only the latter two courts exercise criminal jurisdiction. Juvenile courts, which deal with "delinquencies" rather than "crimes" committed by young persons under sixteen years of age, are not regarded as part of the conventional administration of the criminal law.

The constitution and functions of the respective courts exercising criminal jurisdiction will be examined in succeeding chapters.

³³B.N.A. Act, s. 100.

³⁴*Ibid.*, s. 92(14).

³⁵See pp. 33-4 *supra*.

Section 1

**PROVINCIAL COURTS OTHER THAN THE
SUPREME COURT OF ONTARIO**

CHAPTER 38

Justices of the Peace. Qualifications and Functions

NO proper appraisal of any judicial office can be made without some knowledge of its history. History contributes much to the structure, powers and functions of the office of justice of the peace. These are quite different from similar judicial offices in countries that are without a basis of English tradition.

HISTORY OF THE OFFICE IN ENGLAND

The office of justice of the peace is more than six hundred years old. As early as 1327 Edward III ordained that "good men and lawful" should be appointed for the better maintaining and keeping of the peace in each county.¹ In 1344 these keepers or conservators of the peace were given statutory authority to act jointly "with others wise and learned in the law" to hear and determine felonies and trespasses.^{1a} The "keepers" of the peace thus became "justices" of the peace, although the latter term was not officially used until 1360 when a statute was passed entitled "What sort of persons shall be Justices of Peace; and what authority they shall have". This statute assigned to every county in England "one Lord and with him three or four of the most worthy in the county with some learned in the law" to keep the peace, arrest and imprison offenders and hear and determine felonies and trespasses.²

¹1327, 1 Edw. III, Stat. 2, c. 16.

^{1a}1344, 18 Edw. III, Stat. 2, c. 2.

²1366, 34 Edw. III, c. 1.

Two years later these "most worthy" persons became justices of the peace in their own right when they were empowered, independently of others learned in the law, to hold courts four times a year, with a jury, to try criminal offenders.³ These courts, known as Quarter Sessions, have continued to the present day in England, and in Ontario are reflected in the General Sessions of the Peace presided over by county and district court judges.

By an act of 1389 justices of the peace were required to be the most sufficient knights, esquires and gentlemen of the land.^{3a} A further act of 1439 required them to own land valued at twenty pounds a year.⁴ In other words, they were to be of the "landed gentry".

As the stature of justices was increased, so also were their powers. By successive statutes the criminal jurisdiction of Quarter Sessions was extended. Beginning in the fifteenth century, justices of the peace were also empowered to try certain offences without a jury outside of Quarter Sessions. Meetings of justices of the peace in the exercise of this summary jurisdiction became known as Petit Sessions (changed in name to Magistrates' Courts in 1949). In the intervening years the jurisdiction of justices of the peace consistently increased as respect for the institution grew and today the vast majority of criminal prosecutions in England are disposed of by justices of the peace in the exercise of their summary jurisdiction.⁵

Thus from the very beginning justices of the peace were usually members of "the gentry". They were persons who felt the responsibilities of their position, who acted out of a deeply developed sense of stewardship, and who were respected and relied on by their poorer neighbours, to whom they were the embodiment of "the law". As Maitland remarked: "The most learned 'barrister of seven years' standing' [stipendiary Magistrates] will find it hard to get so high a reputation among country folk for speaking with the voice of the law, as that which has been enjoyed by many a country squire whose only juristic attainment was the possession of a clerk who could

³1362, 36 Edw. III, Stat. 1, c. 12.

^{3a}1389, 13 Ric. II, c. 7.

⁴1439, 18 Hen. VI, c. 11.

⁵*The Justice of the Peace in England*, 18 U. Miami L. Rev., 517, 520 (1964).

find the appropriate page in Burn's Justice".⁶ From the outset, the English system has rested upon a firm basis of integrity and competence, and, as a consequence, it has always enjoyed public confidence.

HISTORY OF THE OFFICE IN CANADA

The office of justice of the peace was imported into Canada with the introduction of English criminal law into the Province of Quebec by Royal Proclamation in 1763 and was extended into what is now the Province of Ontario, by the Quebec Act of 1774. A Royal Commission was addressed to Governor Murray in 1763, granting him "full power and authority to constitute and appoint (*inter alia*) justices of the peace".⁷ Justices of the peace had therefore been exercising jurisdiction for twenty-eight years before the Province of Upper Canada was created by the Constitutional Act of 1791. When, in 1800, the Legislature of Upper Canada adopted the criminal law of England as it stood in 1792, as the criminal law of the Province, the justices of the peace acquired the same extensive powers and authority enjoyed by their English counterparts.⁸

THE OFFICE IN ONTARIO

The office in England is the embodiment of an institution quite foreign to the Canadian way of life. It is an office filled by those who are inspired by a sense of responsibility to render public service and act without pay or remuneration. Such people are difficult to find in Ontario. The conditions in Canada in 1763 when the office was first introduced were not such that the office could be more than faintly similar to its English counterpart. In those days justices of the peace were creatures of necessity and their image was one of convenience. The necessity for localized tribunals presided over by justices of the peace arose from a scattered and rural civilization which

⁶Maitland, *I Collected Legal Papers*, (1888), "The Shallows and Silences of Real Life", 467, 477.

⁷*Re R. v. Isbell* (1928), 50 C.C.C. 81, 94.

⁸*The Queen v. Malloy* (1900), 4 C.C.C. 116, 121; *Re R. v. Isbell* (1928), 50 C.C.C. 81, 94.

could not afford established and regular judicial machinery. The lack of adequate transportation made a centralized system of judicial administration impractical. In these circumstances it was necessary to create a convenient substitute for a stable court system. The justice of the peace was that substitute.

With the growth of population and the development of transportation facilities, the demand for a trained judiciary and an organized system of administering justice had to be satisfied. The justices of the peace courts did not satisfy this demand. They were courts designed to meet the minimum standards of justice, rough-hewn in a rough land. They lacked the firm foundation upon which the English system was based and became increasingly ineffective in the face of the developing complexities of life. The justice of the peace courts gradually gave way to courts presided over by full-time salaried judicial officers—recorders, stipendiary magistrates, and courts of district and county court judges.

In 1842 an effort was made to improve the standards and qualifications of justices of the peace, having in mind their very considerable powers and authority which had been inherited from England. The preamble to a statute passed in that year recited:

“Whereas as well by the Criminal Laws of England, in force in this Province, as by diverse Provincial Acts, Justices of the Peace are invested with great powers and authority, wherefore it is become of the utmost consequence to all classes of Her Majesty’s Subjects, that none but persons well qualified should be permitted to act as Justices of the Peace: and whereas the laws now in force in this Province are insufficient for that purpose; Be it therefore enacted . . . that . . . all Justices of the Peace to be appointed in the several Districts of this Province shall be of the most sufficient persons, dwelling in the said districts, respectively.”

The same statute provided that all justices of the peace must hold land to the value of three hundred pounds over and above all encumbrances.⁹

This attempt to remould the image of the justice of the peace into that of an English country squire did not work out

⁹An Act for the qualification of Justices of the Peace, Statutes of Upper Canada 1842, 5 Victoria, c. 3, ss. 1, 3.

and probably was an impossible aim. By degrees, the "great powers and authority" of the justices of the peace were taken over by magistrates and judges as urbanization made a central and more stable court system possible. Immediately after Confederation it was provided by statute that no justice of the peace (other than a Police Magistrate) "shall adjudicate upon, admit to bail, discharge prisoners or otherwise act, except at the Courts of General Sessions of the Peace, in any case for any town or city where there is a Police Magistrate, except in case of the illness or absence, or at the request in writing, of the Police Magistrate".¹⁰ At this time the bench of the court of General Sessions of the Peace, the equivalent of Quarter Sessions in England, was composed of the county court judge, as chairman, sitting with justices of the peace. After 1873, however, county court judges presided alone and the presence of justices of the peace was no longer necessary in order to constitute the court.¹¹

THE OFFICE IN ONTARIO TODAY

The jurisdiction of the justice of the peace, as a court, is very limited in comparison to that of justices in England. However, he may exercise important powers in taking informations, issuing warrants, granting bail and when presiding at the trial of summary offences.

We have been unable to determine how many justices of the peace there are in Ontario. The names of 925 appear on incomplete records but we are informed that there is in addition an unknown number whose names are not officially recorded anywhere. There never has been any establishment of justices of the peace or any adequate records of those who hold the office. An imperfect one is kept purporting to show the names of those who have been appointed and those who have been reported to be dead or retired. Justices of the peace move from one jurisdiction to another and out of the country, or die, without the knowledge of any department of government.

¹⁰Law Reform Act, Ont. 1868-69, c. 6, s. 11.

¹¹Administration of Justice Act, Ont. 1873, c. 8, s. 56.

We caused a questionnaire to be sent to all those whose names appear as of record. Notwithstanding a follow-up questionnaire, only 670 replied. Many of those recorded as justices of the peace were dead and others could not be traced. In one instance one had been dead for nearly twenty years. In many cases letters enclosing the questionnaire were returned by the post office because the addressee could not be found. In other cases the letters were acknowledged by the staff of nursing homes on behalf of patients who were too old or infirm to answer for themselves. It is not unfair to assume that the 255 who did not answer the questionnaire sent out by this Commission are either dead, infirm, unknown in the community, or so indifferent to the office they occupy that they ought not to be allowed to hold a judicial office.

Fifty-nine of those reporting were seventy-five years of age or over and twenty-five of these classified themselves as active. Of this group, twenty-five were over eighty years of age, and seven of these classified themselves as active. One hundred and twenty-one of those answering the questionnaire classified themselves as completely inactive and a further forty-one stated that they acted only on rare occasions, making a total of 162 that fall into the inactive class.

An objective examination of the answers based on the fees earned shows a more realistic classification. One hundred and seven proved to be completely inactive, that is, they earned no fees: one hundred and fifty-two acted on such rare occasions that they earned less than \$50 per year in fees. It follows that of the justices of the peace who reported, the appointment or continuance in office of 259 cannot be justified on any basis relative to the office. It is not unfair to add to this number those who did not answer the questionnaire.

It would appear that there are more than 500 justices of the peace in Ontario who should never have been appointed, or ought not to be continued in office. This situation makes a mockery of judicial office and is bound to depreciate respect for law and order in the community. In addition, it makes it difficult for those conscientiously trying to discharge the important duties they have to perform to do so with the dignity the office demands.

We condemn without reservation and with all the emphasis at our command the appointment of justices of the peace as a political reward. Such appointments can only be termed a sort of comic opera title system that can be described in no more appropriate language than "just silly". This foolish process has been indulged in by all governments for many years. We have surely reached such political maturity that judicial office will cease to be a political reward and that judicial titles will no longer be conferred where no real office exists.

We recommend that the appointments of all present justices of the peace should be cancelled and a fresh start be made.

An establishment should be set up with the advice and co-operation of the senior magistrate in each jurisdiction. The required number of justices of the peace for each jurisdiction should be established by order in council. Each justice of the peace should be paid a fixed salary based on the amount of work he is required to do. The work load can readily be determined by having regard to the fees received in the past. It should not be determined entirely in this way, however, for in the past fees have been largely based on costs recovered through convictions. We discuss fully the evils of this system elsewhere in this Report.¹²

The justice of the peace in each jurisdiction should be under the supervision of the senior magistrate, who should be required to report promptly to the Attorney General, if a justice of the peace is absent or unable to perform his duties for more than thirty days, as the judges of the superior, county and district courts are required to report to the Minister of Justice under the Judges Act.¹³

TRAINING OF JUSTICES OF THE PEACE

When some order and organization is established for this office in Ontario a definite system of training should be established. In this Province we have an elaborate system of training for police officers in law and police duties, but ironically

¹²See pp. 643 and 941 *infra*.

¹³R.S.C. 1952, c. 159, s. 36 (2).

laymen are appointed to hold judicial office and receive no real opportunity for training. The most conclusive evidence of this deficiency was put before the Commission by the justices of the peace themselves. The following extracts from submissions made by seven different justices of the peace reporting to the Commission are eloquent testimony:

"Justice is not done to a Justice of the Peace. Consider for a moment, his position. He receives a notice of appointment, a certificate to be hung in a conspicuous place, a copy of the Justices of the Peace Act, a set of R.S.O.'s and is then in business. Being a respectable, law abiding citizen, or he would not have been appointed, he probably has never been in court, has never seen a copy of the Criminal Code, and regards bail as a dollar and cent matter."

"I know of several who have no knowledge of the laws with which they have to deal and who cannot even draw an information or bail bond, and simply sign the various documents drawn by other persons such as police officers."

"After my appointment, I found it extremely difficult to acquire knowledge of my duties, and because of lack of instruction, I wandered along learning by trial and error. The only books I could find were about English J.P.'s which were of little use in our country. It is my hope to attend lectures or courses of instruction, and I would gladly attend at my own expense, or even just be recommended books that I may study to enable me to perform more efficiently."

"One learns from experience, but there is a preliminary period when it is difficult even to ask intelligent questions."

"I am personally very conscious of my inadequacies as a Justice, and although, in theory, a Justice is supposed to be able to call on the Crown Attorney or Magistrate for direction, in practice this is not so. There are portions of my duties that I cannot learn except by instruction or actual practice which I cannot obtain."

"There is absolutely no instruction or guidance whatever and I had to find my own way with the co-operation of the police."

"Once when the Magistrate was unable to appear on an appointed court date, I was asked to sit at the court in order that an officer be there. Fortunately, no one else turned up either so I was saved any possible embarrassment."

Some efforts are currently being made to give the justices of the peace some assistance, but sporadic efforts by way of written instructions and seminars are not sufficient. There must be basic training and justices of the peace must become part of a closely integrated system of the administration of justice. It should be unnecessary to remind ourselves that a justice of the peace daily exercises or fails to exercise a judicial power over the liberty of the subject. Unless he has adequate training he cannot properly discharge the judicial duties imposed on him. It is no *pro forma* power that he exercises when he decides whether a warrant or summons should be issued. It makes a very great difference to the individual concerned whether he is arrested and locked up or summoned. That is not a matter to be decided by the party who lays the information, be he private citizen or police officer.

THE FEE SYSTEM

Of all the justices of the peace in Ontario only eighty-nine are paid on a salary basis; the rest are paid by fees assessed against convicted persons. If there is no conviction the justice of the peace gets no fee.

The following is the schedule of fees and allowances that may be charged in summary conviction matters:

1. Information	\$1.00
2. Summons or warrant	0.50
3. Warrant where summons issued in first instance	0.30
4. Each necessary copy of summons or warrant	0.30
5. Each subpoena or warrant to or for witnesses (A subpoena may contain any number of names. Only one subpoena may be issued on behalf of a party in any proceeding, unless the summary conviction court or the justice considers it necessary or desirable that more than one subpoena be issued.)	0.30
6. Information for warrant for witness and warrant for witness	1.00
7. Each necessary copy of subpoena to or warrant for witness	0.20
8. Each recognizance	1.00

9.	Hearing and determining proceeding	1.00
10.	Where hearing lasts more than two hours -	2.00
11.	Where two or more justices hear and determine a proceeding, each is entitled to the fee authorized by Item 9.	
12.	Each warrant of committal	0.50
13.	Making up record of conviction or order upon request of a party to the proceedings	1.00
14.	Copy of a writing other than a conviction or order, upon request of a party to the proceedings; for each folio of one hundred words	0.10
15.	Bill of costs, when made out in detail upon request of a party to the proceedings (Items 14 and 15 may be charged only where there has been an adjudication.)	0.20
16.	Attending to remand prisoner	1.00
17.	Attending to take recognizance of bail	1.00

Fees and Allowances that May Be Allowed to Peace Officers

18.	Arresting a person upon a warrant or without a warrant	1.50
19.	Serving summons or subpoena	0.50
20.	Mileage to serve summons or subpoena or to make an arrest, both ways, for each mile (Where a public conveyance is not used, reasonable costs of transportation may be allowed.)	0.10
21.	Mileage where service cannot be effected, upon proof of a diligent attempt to effect service, each way, for each mile	0.10
22.	Returning with prisoner after arrest to take him before a summary conviction court of justice at a place different from the place where the peace officer received the warrant to arrest, if the journey is of necessity over a route different from that taken by the peace officer to make the arrest, each way, for each mile	0.10
23.	Taking a prisoner to prison on remand or committal, each way, for each mile (Where a public conveyance is not used, reasonable costs of transportation may be allowed. No charge may be made under this item in respect of a service for which a charge is made under item 22.)	0.10

24. Attending summary conviction court or justice on summary conviction proceedings, for each day necessarily employed 2.00
(No more than \$2.00 may be charged under this item in respect of any day notwithstanding the number of proceedings that the peace officer attended on that day before that summary conviction court or justice.)

Fees and Allowances that May Be Allowed to Witnesses

25. Each day attending trial 4.00
26. Mileage travelled to attend trial, each way, for each mile 0.10

Fees and Allowances that May Be Allowed to Interpreters

27. Each half day attending trial 2.50
28. Actual living expenses when away from ordinary place of residence, not to exceed per day 10.00
29. Mileage travelled to attend trial, each way, for each mile 0.10¹⁴

We discuss and condemn the fee system in the administration of justice elsewhere in this Report.¹⁵ It is subversive to the administration of justice. The payment of judicial officers on a piece-work basis necessarily diminishes the public respect for law and order. The fee system is a real inducement to justices of the peace to curry favour with police officers in order to "get business". One justice of the peace answering the questionnaire of the Commission said:

"I have not had any business from the ————— police department yet but we now have a new Chief of Police who has promised me that he will call upon me periodically."

Another stated:

"It has come to my attention that ————— has been very ardent in his duties as Justice of the Peace. . . . It was brought to my attention that he was riding with the police so that he would be very handy if he was required as a Justice of the Peace. . . . My personal views are that a Justice of the Peace should be handy when required but certainly should not be looking for work."

¹⁴Crim. Code, s. 744.

¹⁵See p. 519 *supra*.

Still another said to the Commission:

"Some Justices of the Peace feel powerless to resist pressure or to attend to complaints from prisoners if they are financially dependent upon the job. The position of Justice of the Peace has no security because it depends upon keeping the goodwill of police officers if he or she is to continue processing their summonses. I feel that we could perform our old time function of protecting the rights of accused persons if we were made independent by being paid a salary."

This testimony coming from justices of the peace themselves convinces us that the whole concept, that the office should stand as a safeguard of the civil rights of the individual against the exercise of arbitrary police power, is in many cases, and probably in most cases, little more than a sham. In saying this we do not want to be taken as condemning individuals. We are condemning a system under which many conscientious and dedicated individuals are required to work.

If the recommendations of this Commission are adopted, the office of justice of the peace may be given a meaning and it may attract well-qualified men and women who are prepared to render public service in this area of the administration of justice. With the development that we envisage, the magistrates should be relieved of certain tasks that do not require highly trained legal talent. As we have said elsewhere in this Report, the magistrates carry on their judicial duties under a pressure that is inconsistent with duties involving the liberty of the subject and the civil rights of the individual.

RECOMMENDATIONS

1. The whole system pertaining to the office of justice of the peace should be reorganized.
2. An establishment of justices of the peace should be set up for each magisterial jurisdiction.
3. The appointment of all present justices of the peace in Ontario should be cancelled. Those qualified for the office should be reappointed. No more justices of the peace should be appointed in any case than are required to fill the necessary establishment.

4. Men and women should be appointed to the office without discrimination and qualification should be the only criterion for appointment.
5. All appointments should be to a magisterial jurisdiction, but a justice of the peace might be given duties beyond the magisterial jurisdiction.
6. The senior magistrate should have supervisory power over the justices of the peace of his jurisdiction.
7. Where a justice of the peace dies, or is absent from or unable to perform his duties for more than thirty days, the senior magistrate of the jurisdiction should be required to report the facts to the Attorney General.
8. All justices of the peace should be paid a salary based on the demands on their time as shown by a review of the duties they perform.
9. All justices of the peace should be required to take a prescribed course of training for the office and to attend prescribed refresher courses.
10. The justice of the peace should be allowed a meaningful share of the judicial work in each jurisdiction so as to relieve the magistrates of those duties which appropriately can be performed by well-trained justices of the peace.

CHAPTER 39

The Magistrates' Courts: Qualifications and Functions of Magistrates

THE magistrate's court is probably the most important and most neglected court in Ontario. In the year 1965, 2,089,648 cases were disposed of in the magistrates' courts. Ninety-five per cent of those charged with indictable offences in the province were tried by magistrates (fifty-two per cent on the election of the accused and forty-three per cent in the exercise of an absolute jurisdiction under section 467 of the Criminal Code). These totalled 15,509. All those charged with summary offences were tried in the magistrates' courts by magistrates or justices of the peace. These totalled 2,074,139.

The magistrates have jurisdiction to try with the consent of the accused all indictable offences, save only those few which must be tried in the Supreme Court of Ontario. The jurisdiction of the magistrates involves power to sentence the accused to life imprisonment and impose corporal punishment. There are seventeen offences, within the jurisdiction of a magistrate, where on conviction the accused may be sentenced to life imprisonment, and thirty-nine offences for which one may be sentenced to imprisonment up to twenty-five years. The fact that this jurisdiction is only exercised with the consent of the accused does not alter the importance of the jurisdiction. The fact that in fifty-two per cent of the cases involving indictable offences the accused finds it necessary to submit to the jurisdiction of the magistrate, merely emphasizes the importance of the jurisdiction.

The trial of summary offences cannot be considered an unimportant jurisdiction. In fact the vast proportion of the members of the public that come in contact with the courts are concerned with summary offences, whether they be alleged breaches of the Highway Traffic Act, the Liquor Control Act, municipal by-laws, or other violations of provincial statutes. To such people, the only image of the administration of justice is what they find in the magistrates' courts.

THE OFFICE OF MAGISTRATE

Magistrates in Ontario are appointed and their salaries fixed by the Lieutenant Governor in Council. They all have jurisdiction throughout the province. There are no stated qualifications for appointment. Of the 114 magistrates in Ontario, ninety are qualified lawyers and seven of these are on a part-time basis. The full-time magistrates hold office during the pleasure of the Lieutenant Governor in Council, but a magistrate who has held office for two years may only be removed from office for misbehaviour or inability to perform his duties properly, and only after an inquiry presided over by one or more judges of the Supreme Court.¹

The salaries of full-time magistrates were fixed by order in council on October 13, 1966, as follows:

<i>Position</i>	<i>Annual Salary Rate</i>	
	<i>Minimum</i>	<i>Maximum</i>
Chief Magistrate of Ontario	—	\$18,000
Magistrate, being admitted member of the Law Society of Upper Canada	\$14,000	\$17,000
Magistrate, not being a member of the Law Society of Upper Canada	\$13,000	\$15,000
Deputy Magistrate, being admitted member of the Law Society of Upper Canada	\$10,500	\$12,000
Deputy Magistrate, not being member of the Law Society of Upper Canada	\$9,500	\$11,000

¹Magistrates Act, R.S.O. 1960, c. 226, s. 3.

The salaries are paid by the province. The magistrates come under the Public Service Superannuation Act.² They must retire at seventy years of age, unless appointed prior to July 1, 1941, in which case the retirement age is seventy-five. They may elect to retire at sixty-five.³

Many submissions were made to the Commission expressing the view that all magistrates should be qualified lawyers. In view of the importance of the office and the complexity of many cases that come before the magistrates' courts it is an unjustified encroachment on the rights of the individual that he should be compelled to have his rights determined by one untrained in the law, or have to submit to the alternative of taking his case to a higher court in order that he may have a decision from a legally trained mind. This is without question an infringement on basic civil rights.

There may be a routine class of cases, such as minor traffic offences, which have little or no legal aspects, which might well be dealt with by justices of the peace who are not qualified lawyers. In such cases the accused should have the right to elect to have his case heard by a legally qualified magistrate if it is demonstrated that the case involves substantial questions of law.

There are no doubt some exceptional instances in which magistrates without legal training have by reason of diligence and perseverance become good magistrates, but even they, during their period of self-training, must have depended largely on the legal knowledge of the crown attorney, and the accused persons probably were the objects of judicial training.

SALARIES OF MAGISTRATES

The salary structure of the magistrates must be designed to provide fair compensation for properly qualified persons who hold such an important office. The salary structure is quite illogical. If the magistrate is qualified for the office, there should be no distinction between those who are qualified lawyers and those who are not. Neither should there be

²R.S.O. 1960, c. 332, s. 24.

³Magistrates Act, R.S.O. 1960, c. 226, s. 4, as re-enacted by Ont. 1961-62, c. 76, s. 1; Public Service Act, 1961-62, Ont. 1961-62, c. 121, s. 10, as amended by Ont. 1966, c. 130, s. 1.

any distinction between magistrates and deputy magistrates who perform the same duties and exercise the same jurisdiction. Except in the case of the Chief Magistrate of Ontario, who has special administrative duties to perform, all magistrates should be treated alike and receive the same remuneration. The salaries provided have no relation to the importance of the office. It is not an office to be filled by older men who may regard it as a form of semi-retirement. Men appointed to it should be vigorous young persons who bring to the office a broad practical experience of life gained from some years in the practice of the law. They should be paid salaries that will enable them to live and educate their families in dignity. The office is one of public service and those who occupy it should be prepared to make some sacrifice in the public service, but they should not be called upon to sacrifice the interests of their families.

The present salaries are inadequate and unrealistic. \$10,500 per annum is not fair remuneration for a qualified lawyer who is willing to assume the duties of a magistrate. Having in mind that the office is a judicial one, the salary scale should be equated to that of county court judges.

There does not seem to be any sound reason for continuing the office of deputy magistrate since he performs the same duties and functions as a magistrate. It may well be that in municipalities where there are two or more magistrates, the senior magistrate should be designated for administrative purposes as the Senior Magistrate; otherwise the office should be the same and the salary should be the same.

PART-TIME MAGISTRATES

There are seven part-time magistrates in the Province. Five are paid a monthly salary and two are paid on a *per diem* basis.

Objections to the appointment of part-time magistrates were made to the Commission. These objections appear to be well founded. It is improper for one holding a judicial office of this character to be engaged at the same time in the practice of law or any business, and to do so is not consistent

with section 10 of the Magistrates Act. There should be no room for suspicion that the magistrate presiding at a trial may be influenced by his relations with his clients or his business connections. It is most undesirable that lawyers should be appearing before the magistrate one day and carrying on ordinary legal business with him the next day. A submission made to the Commission provides a forcible illustration. Certain members of a labour union were accused of assault. At the trial before a part-time magistrate they received sentences that they felt were out of proportion to other sentences imposed in other cases of assault. The magistrate was a part-time magistrate who practised as a lawyer. It was alleged that he acted for clients who were employers who had disputes arising out of employee/employer relations with the union in question. We are quite prepared to assume that the magistrate acted entirely without bias, but the fact that the circumstances were such as could give rise to the appearance of bias is sufficient to give just cause for the complaint. There is no reason why the magisterial work in Ontario should not be organized in such a way as to eliminate part-time magistrates entirely.

STAFF

There is wide variation in the nature of the staff provided for magistrates throughout the province. In interviews with magistrates it was disclosed that in some cases they were provided with well-qualified and efficient staffs, while in others the magistrate was not even provided with a clerk. The municipalities that do not provide the magistrate with a clerk are by no means "under-privileged" municipalities. In some cases the clerk is seconded from the police department. This is a practice that should be terminated. In no case should the police form an integral part of a magistrate's court. Every magistrate should be provided with an efficient clerk who will look after all details, such as the preparation of the lists, keeping the records of the court and reading the charges in court. In addition, he should take the burden of the minutiae of details involved in the magisterial office from the shoulders of the magistrate, so that he may be free to devote his time to the judicial demands of his office. All such services are pro-

vided for judges and it is just as important and, in fact more important, that they should be provided for magistrates.

In addition, magistrates should be provided with adequate clerical assistance. The preparation of reports for the board of parole is a very important part of the magistrate's duties, and if they are carefully prepared their preparation requires considerable time and clerical help. All too often, these reports are quite perfunctory because the magistrate either does not have the time or the staff to complete adequate reports. One magistrate told us that he had as many as fifteen of these to make out in a day. If the reports are to be useful they should be full and complete.

SEPARATION OF LISTS

Submissions were made recommending that there should be a complete separation of lists of cases coming under the Criminal Code from those coming under the provincial statutes. This might be done in some of the large centres but it is not practical in others. The same result may be accomplished now by administrative action. No doubt the Chief Magistrate in Ontario will endeavour to see that where possible the courts are organized so as to reduce to a minimum any inconvenience to the public that may arise out of both criminal cases and cases under the provincial law appearing on the same list.

THE PROSECUTION OF CASES

The functions and organization of the Crown Attorney's office is discussed in Chapter 62, but it is appropriate to consider here the presentation of evidence for the prosecution in the magistrate's court.

No difficulty arises where the charge against the accused is a criminal one. The crown attorney acts in all such cases. It is different where the offence arises out of a breach of a provincial statute or a municipal by-law. In the former case a police officer often conducts the prosecution and examines and cross-examines the witnesses. In the latter, the municipality often is represented by counsel retained by the municipality for the particular case, or by counsel from the legal staff of the municipality. Both these courses are objectionable. A

traffic court is an important court; the trial of cases in it can either enhance or debase respect for the administration of justice. When one police officer acts as prosecutor and another as witness, while a third may act as clerk of the court, the proceedings do not create public confidence in either the police or the court. There does not appear to be any good reason why a member of the crown attorney's staff could not perform the duties of a prosecutor in almost all cases. Obviously there would have to be proper rotation where this work is heavy, but this is a detail of administration.

It may be satisfactory for municipalities to conduct their own prosecutions arising out of breaches of municipal by-laws, but it is not proper. The days of the private prosecutor have almost entirely passed. If a municipal by-law has been breached, it is a breach of the law and the prosecution should be in the hands of a crown attorney under the direction of the Attorney General who is responsible for law enforcement in the province, and not under the direction of the local municipality.⁴

COSTS

The practice of assessing costs against persons convicted of summary offences has been much criticized. Prior to the revision of the Criminal Code in 1954, when an accused person was convicted of an indictable offence, the court was given power to order the convicted person to pay "the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted".⁵ In summary conviction cases the justices had power to order a convicted person to pay to the complainant "such costs as to the said justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before justices".⁶

In the 1954 revision of the Criminal Code all reference to the power to award costs arising out of the trial of indictable offences was dropped, with the exception of power to

⁴See p. 928 *infra*.

⁵Crim. Code 1927, s. 1044.

⁶*Ibid.*, s. 735.

award costs on a conviction for criminal libel.⁷ However, the power to award costs with respect to the trial of summary offences was retained in an altered form.⁸ The tariff of fees set out⁹ includes, among other things, fees payable to justices for issuing the information, summons, warrant or subpoena; fees payable to the justices hearing the case; constables' fees for arresting the accused; mileage for serving summonses or subpoenas at ten cents a mile both ways, and other mileage allowances; witnesses' fees for attending summary conviction court for each day attending trial at \$4.00 per day, together with travelling allowance each way at 10¢ per mile; fees for interpreters of \$2.50 for each half-day attending trial, and living expenses while engaged away from their ordinary place of residence, up to \$10 a day plus mileage each way at 10¢ per mile.

These provisions of the Criminal Code have been adopted by the Ontario Summary Convictions Act¹⁰ but other costs have been added by provincial legislation. Section 9 of the Summary Convictions Act provides in part as follows:

"9. (1) The justice may award and order, in and by the conviction or order, the defendant to pay to the prosecutor or complainant such costs as to the justice seem reasonable, such costs not being inconsistent with the fees established by law to be taken on proceedings had by and before justices of the peace.

(2) Where the justice dismisses the information, he may by the order of dismissal award and order the prosecutor or informant to pay to the defendant such costs as to the justice seem reasonable, the same not being inconsistent with the fees established by law to be taken on proceedings had by and before justices of the peace."

Where there is a conviction the costs are recoverable in the same manner as the penalty provided, that is, by the imposition of a term of imprisonment. These costs include those of conveying the convicted person to prison. On the other hand, where there is no penalty to be recovered or where

⁷Crim. Code 1954, s. 631.

⁸*Ibid.*, s. 716.

⁹*Ibid.*, s. 744.

¹⁰R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1.

the information is dismissed, the costs are recoverable only by distress and sale of the goods and chattels of the party against whom the order is made. The costs awarded to the prosecutor or informant or to the defendant, as the case may be, may include a counsel fee of such an amount as the justice deems reasonable, but not more than \$10.00.

Regulation 68, passed pursuant to the Crown Attorneys Act,¹¹ provides a schedule of fees for crown attorneys. This schedule is not authority for the assessment of costs pursuant to the schedule against convicted persons, but it provides for the tariff of fees chargeable against municipalities or government departments. However, under section 3 of Regulation 68 any counsel fee collected from a defendant under the Summary Convictions Act shall be credited to the crown attorney's fees that are properly payable to him by a municipality or a government department or agency. The destination of the costs collected depends to a certain extent on where the offence was committed and who lays the charge.¹²

A perusal of the magistrates' monthly returns shows that there is no consistent policy with respect to the assessment of costs against convicted persons. It is difficult to say on what basis costs are awarded. It was quite apparent that in some cases the magistrate in one county would charge a magistrate's fee of \$2.00, and in others, \$1.00. In fact, the same magistrate sitting in one county consistently charged a magistrate's fee of \$2.00, and when sitting in another county he consistently charged a magistrate's fee of \$1.00. Some magistrates do not assess the crown attorney's fee, while other magistrates will frequently assess a crown attorney's fee. A fee for the justice of the peace will sometimes be assessed and other times not be assessed. It would appear that if the justice of the peace is paid on a fee basis it is always assessed.

A constable's fee may or may not be assessed. In some counties where the constable is paid a salary he is permitted to keep the constable's fee assessed on summary conviction cases. It is usually assessed. Where the constable is given

¹¹R.S.O. 1960, c. 82, s. 18; R.R.O. 1960, Reg. 68.

¹²These aspects of the imposition of costs will be more fully dealt with in Chapters 59 and 60 *infra*.

either witness fees or a constable's fee out of the costs assessed by the magistrate, he naturally has a pecuniary interest in the result of the trial. A practice seems to have developed in some counties of assessing \$10.00 against an accused as a crown attorney's fee, as part of the costs he is ordered to pay. It has been stated that in the past this has been done even in very minor cases that found their way into court. There has been some change in this practice, but it was stated by one crown attorney that a convicted person in one county often has to pay very much more by way of costs than he would for a conviction under an identical charge in another county.

Merely to state the inconsistencies in the practices throughout Ontario with respect to the assessment of costs is sufficient to warrant the adoption of a new approach to the whole problem.

The practice of awarding costs in criminal cases or for breaches of provincial statutes is a relic of the distant past when magistrates' courts were known as police courts and magistrates and justices of the peace were on a part-time basis and paid on a fee basis. The constables also were engaged on a part-time basis and paid on a fee basis. The whole practice of awarding costs against convicted persons is objectionable on these and other grounds:

1. The administration of justice is a public service carried on by the state and ought not in any sense to be dependent for its maintenance on the results of the trial.

2. No one, be it a court official, police officer, municipality or the government, should have a monetary interest in securing a conviction, over and above the remote interest that the government may have through the disposition of fines.

3. The payment of costs is a debt and not a punishment, but the alternative is imprisonment. Public authorities should not have power to imprison for debt.

4. The accounting for costs under all the different headings is a burden on the magistrates' and justices' courts which they are ill equipped to bear.¹³

5. The imposition of costs is an unjust and discriminatory punishment on a convicted person. Examples of this

¹³See Chapter 59 and Appendices B and C *infra*.

were given to the Commission by the magistrates. For example, a resident of Toronto may become involved in an highway traffic accident in Toronto with an automobile owned and driven by a resident of Windsor. There may be witnesses to the accident who come from Windsor or other places some distance from Toronto. The accused is convicted and the fine may be quite inconsequential compared with the costs through witnesses' fees, which could well amount to some hundreds of dollars. On the other hand, if another person is convicted of the same offence but the witnesses happen to live in Toronto, the costs would be considerably less than the amount of the fine imposed. Such cases are very common and give the magistrates much concern. Some magistrates stated that they try to modify the injustice by reducing the amount of the fine. However, they acknowledge that this is a subterfuge and not a solution. Fines are levied for punishment. Costs are levied to compensate the municipality or the province for the expense of the prosecution.

The only just solution is to treat summary offences in the same way that indictable offences have been treated with respect to costs, and to eliminate the assessment of costs in reference to prosecutions arising under provincial statutes. We recommend that this be done.

COLLECTION OF FINES

Many magistrates felt that the great distances in Ontario frequently contribute to unequal justice, particularly with regard to offences arising out of breaches of the Highway Traffic Act. For example, a resident in Sudbury may be charged with a breach of the Highway Traffic Act in the town of Cobourg. He is summonsed and he fails to appear in answer to the summons. The trial proceeds in his absence and he is fined \$25. The convicted person is notified of the fine but does not pay it. Under the present procedure there are three alternatives:

1. To send a police officer to Sudbury to arrest the defaulter and bring him to Cobourg; or
2. To take some form of civil proceedings; or
3. To let the matter drop.

To follow the first alternative would incur an expense out of all proportion to the amount of the fine involved. Likewise, to follow the second would be difficult, expensive and probably futile. The result is that in most cases the solution has been the third alternative and the course of justice has been defeated.

The appendix to this chapter shows that the problem of unpaid fines is not an inconsequential matter. At the end of 1964 there were outstanding in the province unpaid fines in the amount of \$1,143,975.03. The amount increased in 1964 over the year 1963 by \$286,714.20. While this is not the place to discuss the reason for this increase, a study of the record shows that in one year the unpaid fines increased in some cases by more than 100%, while in other cases the increase was very slight. It is quite true that not all unpaid fines arise out of the problem we have been discussing, but the magistrates are convinced that the problem of the inability to impose realistic sanctions does give rise to a very substantial portion of the defaultations.

It was submitted to the Commission that legislation should be passed providing that where an accused has been convicted of a breach of a provincial statute and a fine has been imposed, with the alternative of imprisonment in the case of non-payment, on default the court imposing the fine should have power to issue a warrant of committal. When backed by a justice having jurisdiction in the locality where the convicted person is found, this warrant should authorize a police officer to arrest the defaulter and the governor of the gaol in that locality to receive him. This would appear to be a simple and proper solution of the difficulty. It is recommended that such legislation be enacted, but the legislation should provide means by which the defaulter may pay the fine in order to avoid imprisonment or procure his release, and by which the fine may be remitted to the court imposing it. These are details to be worked out. The principle is sound and it is equally sound that there should be no special advantages in the administration of justice dependent on the residence of the accused.

ACCOMMODATION IN MAGISTRATES' COURTS

The accommodation provided for the magistrates' courts throughout Ontario in many cases is very unsatisfactory. It is important that the magistrates should not be forced to hold court only in the county towns in order to get proper accommodation. Even in the county towns in some cases the accommodation is unsatisfactory. It is important that magistrates' courts should be held in the larger towns in the county. Witnesses and bondsmen ought not to be called upon to travel very substantial distances in order to serve in their respective capacities in the administration of justice. It is not the purpose of this Commission to deal in detail with accommodation provided for the magistrates throughout Ontario. Some illustrations, however, are useful to demonstrate the sort of accommodation to which the administration of justice ought not to be subjected.

In the County of Norfolk the court sits in Simcoe on Tuesdays and Thursdays. The courtroom is on the second floor, reached only by a long stairway. There is no satisfactory waiting room and the courtroom is overcrowded.

In the town of Listowel the magistrate's court is held on the same floor as the police quarters and a community recreation room. The quarters are said to be entirely inadequate, poorly located and noisy.

In Markdale no properly dignified accommodation is provided. The only consulting room available is used by barristers, probation officers and the local police officers.

In Watford the magistrate conducts the court in the basement of the public library. The room is a sort of furnace room. When the furnace comes on during the sessions of the court it is necessary either to turn it off or submit to the noise.

In several courtrooms the magistrate either has to share a room with the police officers or have no room to remove his coat and hat, or consult in private with probation officers or those who may wish to discuss matters in private.

In Metropolitan Toronto the accommodation provided for magistrates for years can only be termed disgraceful. One

court is held in a police station. Other courts are held in rooms that are not designed in any way to provide accommodation for courts. When accommodation for the magistrates' courts in which the administration of justice for the community is carried on is compared with accommodation that is provided for such operations as the work of the committees of a city council, the board of education and the other municipal and government offices in the city, one cannot come to any other conclusion than that those responsible have no concept of the elementary rights of accused persons and witnesses who may attend trials, and the rights of the public, to have justice administered with dignity and in circumstances that convey a respect for the law. This condition has been partially relieved since the opening of the new court house, but not entirely.

APPOINTMENT OF MAGISTRATES

There has been a tradition in Ontario that there should be a strong political influence in the selection of magistrates. This has not been peculiar to any political party nor does the influence differ substantially from that which has been brought to bear on the appointment of judges by successive federal governments. There have been isolated cases where one who has not been a supporter of the party in power has been selected for the office, but such cases are unusual.

The appointment of a magistrate on the basis of political qualifications cannot be justified on any ground. It is not consistent with the elementary concepts of justice that one who has attained office merely by political service should have the right to preside over the liberty of the subject. On the other hand, no one should be excluded from an appointment because he has taken an interest in public affairs, either by reason of having held or stood for public office or having supported a particular party.

The task of selecting magistrates is an extremely difficult one and places a heavy responsibility on the Attorney General. There are no checks under our system such as the public hearings before the Senate Judiciary Committee of the U.S.A.,

which reviews the nomination of federal judges for appointment. Such procedure provides some safeguards against unsuitable appointments, but it is not desirable that such a procedure should be followed here.

It has been suggested that the Attorney General should have a consultative committee of very responsible citizens to advise him on appointments. One of the advantages of such a committee would be to relieve him of political pressure.

The office of magistrate in the provinces of Canada is quite different from a similar office in continental countries and it is not the same as in England, although it is in some degree patterned on the English system. In England the office is held either by a distinguished citizen who considers it a great honour to be asked to fill the office and does so on a part-time basis, or by a stipendiary magistrate who is one who has reached considerable prominence in the community.

In continental countries, when a lawyer graduates from a university he may decide to enter the practice of law or the judicial branch of government. If he wishes to become a judge he takes further legal training. This may be for several years. When he finishes his academic training he may be appointed to one of the lowest courts. At first he does not decide cases but only acts as an observer. In due course he will assume judicial duties and will enter on a career which involves promotion from one court to another until he may reach the highest court. Each country differs in detail, but the principle is substantially the same. The judicial career is recognized and promotion is expected.

In Canada it is exceptional that a magistrate is appointed to be a county court judge, or a county court judge appointed to be a Supreme Court judge. It is much better so, as long as there is any element of political influence brought to bear on appointments. It would be a corrupting thing for a magistrate or a judge to be in a position in which he could use his judicial office politically to advance his own promotion.

Consideration should be given to the appointment of a judicial council composed of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Judge of the

County and District Courts, and the Treasurer of the Law Society of Upper Canada, or someone appointed by him. The Attorney General could consult with such a council and secure its recommendations as to the qualifications of those considered for appointment. The Attorney General and the Lieutenant Governor in Council must take the final decision and responsibility, but the judgment of such a judicial council would do much to mitigate the power of political influence and reduce the risk of unfortunate appointments.

While the independence of the judiciary is essential in the administration of justice and is of incalculable importance, it should not be a cloak for preserving in office irresponsible judges or magistrates who have proved to be quite unsuitable for the tasks they have to perform. This Commission is only concerned with those members of the judiciary who are appointed by the Lieutenant Governor in Council. Section 3 of the Magistrates Act¹⁴ makes provision for the removal of a magistrate who has been in office for two years, for "misbehaviour or for inability to perform his duties properly". He may, however, only be removed after inquiry by one or more Supreme Court judges. This section has not been invoked since it was passed in 1952.

To give greater powers of removal than are contained in this section would be an unwarranted interference with the independence of magistrates. However, there should be some clarification of what is meant by "misbehaviour or . . . inability to perform his duties properly", and there should be some more practical means of invoking the provisions of the section. Members of the Bar and members of the public, and even members of the judiciary, are most diffident and careful about exposing misbehaviour of members of the judiciary. Likewise, the Attorney General jealously avoids any appearance of supervision of the judiciary, and the course he adopts is a proper one. There should be some body to which members of the Bar and members of the public could present grievances with respect to the conduct of members of the judiciary. If the judicial council recommended in this chapter

¹⁴R.S.O. 1960, c. 226.

is appointed, such a body might consider serious complaints and decide whether an investigation under section 3 of the Magistrates Act is warranted.

EXTRA-JUDICIAL EMPLOYMENT OF MAGISTRATES

In Section 3 of this Part we discuss the employment of judges to render extra-judicial services.¹⁵ No constitutional question arises in considering the same question in relation to magistrates and the legal problems are different, but the principles are substantially the same. The Magistrates Act provides that "a magistrate shall not practice any profession or actively engage in any business, trade or occupation but shall devote his whole time to the performance of his duties as magistrate".¹⁶

There are no express provisions in the Act forbidding a magistrate to accept remuneration for extra-judicial service. However, section 10 would appear to be a clear prohibition against engaging in employment other than magisterial duties. Notwithstanding this express prohibition, thirty-seven magistrates are employed on sixty-eight Boards of Commissioners of Police, for which they are in some instances paid substantial salaries, while in other cases the amount paid to the magistrate is quite trivial. Magistrates ought not to be members of Boards of Commissioners of Police for many reasons. Not the least of these is that there ought not to be an employer-employee relationship between judicial officers and the members of the police force. Another equally sound reason is that Police Commissioners make laws. A judicial officer ought not to be engaged in the legislative process other than that which may relate to procedure.

Apart from employment of magistrates on Boards of Commissioners of Police, eight magistrates were employed as members of boards of conciliation and in labour disputes during the years 1960 to 1965, including one who is now retired. His time spent on these duties was very little. A magistrate, now retired, while active was paid \$32,220 over the

¹⁵See pp. 681 ff. *infra*.

¹⁶R.S.O. 1960, c. 226, s. 10.

period. This amount would indicate that almost 500 days during that period were devoted to duties that did not come within section 10 of the Magistrates Act. These duties were performed at the request of the Minister of Labour.

There can be no doubt about the importance of the duties in question, but it is quite contrary to the Magistrates Act to ask magistrates to perform them. In addition, it is not just to accused persons that magistrates who are appointed to preside over trials should be otherwise engaged, nor is it just to other magistrates, who perform their duties at their fixed salaries, to be required to substitute for magistrates who are receiving remuneration in addition to their salaries.

In 1964 a Chief Magistrate for Ontario was appointed whose duty it is to exercise supervisory powers, in arranging the sittings of the magistrates for hearings as the circumstances require.¹⁷ One of the purposes in creating the office of Chief Magistrate for Ontario was to equalize the case load of magistrates in the various counties and to provide for assistance in case of illness or absence. That being so, it is desirable that all magistrates be available to perform their magisterial duties as required of them.

There is another objectionable feature to magistrates' acting on labour arbitrations or in labour disputes. Very frequently disturbances arise out of labour disputes and these come to the magistrates' courts in one form or another. A magistrate who has acted as a conciliator or an arbitrator, and received remuneration as such, is in a very difficult position when he is called upon to try those accused of committing breaches of law, be they employers or employees, which may arise out of strikes or lockouts. It is highly desirable that magistrates, like county court judges, confine themselves to the performance of their judicial duties.

RECOMMENDATIONS

1. All magistrates should be appointed to serve on a full-time basis.
2. All magistrates, except the Chief Magistrate for Ontario, should receive the same salary.

¹⁷Ont. 1963-64, c. 57, s. 4.

3. The office of deputy magistrate should be abolished.
4. For administrative purposes one magistrate in an area should be designated the senior magistrate.
5. The salaries of magistrates should be equal to those of county court judges.
6. Only those with qualifications sufficient to command such salaries should be appointed to be magistrates.
7. All magistrates should be qualified lawyers.
8. All magistrates should be provided with adequate staff.
9. All cases in the magistrates courts should be prosecuted by qualified lawyers.
10. The practice of assessing costs in magistrates courts should be abolished.
11. Where a magistrate has levied a fine in a jurisdiction of which the accused is not a resident, and there is default in payment of the fine, the magistrate should be empowered to issue a warrant of committal which upon being backed by a justice of the peace wherever the defaulter is found would authorize the governor of the gaol in that jurisdiction to receive him.
12. Adequate and proper accommodation should be provided for all magistrates' courts, separate and apart from that provided for the administration of police forces.
13. Provision should be made for an advisory judicial council on the appointment of magistrates consisting of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Judge of the County and District Courts, and the Treasurer of the Law Society of Upper Canada or his nominee. This council would advise the Attorney General on the appointment of magistrates.
14. The advisory judicial council should be authorized to receive complaints concerning the conduct of magistrates in the performance of their duties, and to make recommendations, where warranted, that an investigation be conducted under the provisions of the Magistrates Act to determine whether the magistrate involved should be removed from office.
15. Magistrates should not be permitted to accept extra-judicial employment for remuneration.

APPENDIX TO CHAPTER 39

List of Unpaid Fines in Magistrates' Courts

<i>County or District</i>	<i>Balance Unpaid Fines December 31, 1963</i>	<i>Add Unpaid Fines 1964</i>	<i>Total Unpaid Fines December 31, 1964</i>
Algoma—Sault Ste. Marie	\$ 592.85	\$ 231.15	\$ 824.00
—Bruce Mines	.....	.....	.....
—Elliot Lake	373.60	686.95	1,060.55
Brant	9,638.95	520.00	10,158.95
Bruce	.....	.....	.....
Carleton—City (Ottawa)	39,098.00	31,053.00	70,151.00
—County	21,229.75	5,548.70	26,778.45
Cochrane—Cochrane	.....	.....	.....
—South Porcupine	1,492.20	776.00	2,268.20
Elgin—City (St. Thomas)	1,650.98	1,072.11	2,723.09
—County	8,705.52	785.02	9,490.54
Essex—City (Windsor)	8,806.00	11,146.59	19,952.59
—County	12,994.90	4,011.25	17,006.15
Frontenac—City (Kingston)	5,214.10	—(2,803.44)	2,410.66
—County	Nil		Nil
Glengarry	.....	.....	.....
Grey	8,447.94	2,740.53	11,188.47
Haldimand	1,467.22	1,127.50	2,594.72
Halton	27,676.91	26,010.51	53,687.42
Hastings—South	.....	.....	.....
—North	.....	.....	.....
Huron	801.10	855.80	1,656.90
Kenora—Kenora	16,701.70	4,467.66	21,169.36
—Dryden	2,512.00	983.00	3,495.00
Kent	9,953.72	3,343.00	13,296.72
Lambton	7,297.07	5,245.61	12,542.68
Lanark	326.00	46.00	372.00
Leeds & Grenville	2,017.20	5,841.00	7,858.20
Lennox & Addington	581.60	759.50	1,341.10
Lincoln	4,074.55	800.87	4,875.42
Manitoulin	2,312.45	2,080.85	4,393.30
Middlesex—City	14,820.00	4,530.00	19,350.00
—County	7,158.68	4,418.55	11,577.23
Muskoka	.....	.....	.....
Nipissing	2,222.50	1,173.50	3,396.00

List of Unpaid Fines in Magistrates' Courts—Continued

<i>County or District</i>	<i>Balance Unpaid Fines December 31, 1963</i>	<i>Add Unpaid Fines 1964</i>	<i>Total Unpaid Fines December 31, 1964</i>
Norfolk	10,463.24	1,044.45	11,507.69
Northumberland & Durham	33,493.90	12,250.18	45,744.08
Ontario	28,850.37	9,342.19	38,192.56
Oxford	29,303.72	5,807.58	35,111.30
Parry Sound	4,653.25	1,024.97	5,678.22
Peel	16,739.49	6,000.00	22,739.49
Perth	1,673.10	868.90	2,542.00
Prescott & Russell	29,552.88	10,383.45	39,936.33
Prince Edward	385.00	626.30	1,011.30
Peterborough	10,265.10	2,485.25	12,750.35
Rainy River	3,857.60	1,390.85	5,248.45
Renfrew	.....	.....	.....
Simcoe—Barrie	11,577.27	1,906.80	13,484.07
—Orillia	2,512.50	133.00	2,645.50
Stormont—Dundas—Cornwall	10,313.35	5,358.53	15,671.88
—Morrisburg	9,942.43	3,782.82	13,725.25
Sudbury—District	826.17	114.50	940.67
—City & District	7,608.70	6,556.50	14,165.20
Temiskaming	2,716.50	371.50	3,088.00
Thunderbay—Fort William	427.50	191.50	619.00
—Port Arthur	2,782.99	897.00	3,679.99
—District	1,239.00	320.50	1,559.50
Victoria	886.50	723.00	1,609.50
Waterloo—Kitchener & County	12,575.28	7,953.18	20,528.46
—Waterloo	.....	.....	.....
—Hespeler	823.00	727.90	1,550.90
—Galt	4,652.00	2,921.00	7,573.00
Welland—Niagara Falls	2,499.50	2,991.50	5,491.00
—Welland	.....	.....	.....
Wellington	7,151.98	2,201.12	9,353.10
Wentworth—City	46,800.00	11,700.00	58,500.00
—County	9,573.85	7,312.12	16,885.97
York—County	8,975.17	8,119.40	17,094.57
—Metro	325,972.00	53,757.00	379,729.00
TOTAL UNPAID FINES	\$857,260.83	\$286,714.20	\$1,143,975.03

CHAPTER 40

Juvenile and Family Courts

UNTIL an Act for the protection of children was passed in 1893¹ there was no legislation in Ontario for the special treatment of children who had broken the law. Beyond the age of seven years children were considered to be adults, except with respect to procedural requirements that they be tried separately from adults.²

The Children's Protection Act was limited to those cases where children were convicted of offences under provincial statutes. In such cases power was given to the court to commit them to the care of The Children's Aid Society.

It was not until 1908, when the Juvenile Delinquents Act was passed,³ that provision was made for special treatment of young offenders who were charged under the Act with breaches of the law. This Act was not of general application but was brought into force on a local option basis. Special juvenile courts were established only in those areas where they were authorized by the local authorities. The result was that a child who had committed an offence—which would be a crime if committed by an adult—on one side of a boundary road, would be charged as an adult; but if he committed the same offence on the other side of the road, he would be charged as a juvenile offender, if that locality had set up a juvenile court under the provisions of the Juvenile Delinquents Act. Instead of making express provisions for special

¹An Act for the Prevention of Cruelty to, and Better Protection of, Children, Ont. 1893, c. 45.

²Crim. Code 1892, 55 & 56 Victoria, c. 29, s. 550.

³Can. 1907-08, c. 40.

juvenile courts at the outset, where the Act was made to apply every county or district court judge and every magistrate was constituted a juvenile court judge within the meaning of the Juvenile Delinquents Act.⁴

As recently as 1952 only thirty municipalities in Ontario had adopted the provisions of the Federal Act, and it was not until 1963 that it was finally proclaimed for all counties, provisional districts and separate cities and towns in Ontario.

For our purposes it is unnecessary to go into the historical development of the family courts in the Province in detail. Progressively, jurisdiction was conferred on justices of the peace and magistrates to deal with such matters as maintenance of deserted wives and children. As juvenile courts were established, this jurisdiction was transferred to juvenile court judges.⁵

In 1934 the Juvenile and Family Courts Act was passed, constituting the juvenile court a family court for the area for which it was established, and providing for the judge, deputy judge, officers and staff of the family court.⁶

Although juvenile and family courts are designated as courts of record,⁷ they differ from other courts in the judicial system. The social nature of the federal legislation they administer dictates the philosophy for the administration of that Act in express language:

"38. This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as is practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."⁸

"17. (1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances permit, consistently with a due regard for a proper administration of justice."⁹

⁴Ont. 1910, c. 96, s. 1.

⁵Ont. 1929, c. 36.

⁶Ont. 1934, c. 25.

⁷R.S.O. 1960, c. 201, s. 2.

⁸R.S.C. 1952, c. 160, s. 38.

⁹*Ibid.*, s. 17(1).

The jurisdiction exercised as a family court has similarly peculiar social functions. Rights and obligations are the subject of adjudication, but at the same time the function and duty of the court is to promote the welfare of the family.

It is not within the Terms of Reference of this Commission to consider the broad question of the treatment of juvenile delinquents, nor the problems arising out of the family relationship. We confine our consideration of the subject to four basic fundamentals:

- (1) The jurisdiction exercised by juvenile and family court judges;
- (2) The appointment and qualification of juvenile and family court judges;
- (3) The financial and administrative arrangements for the courts;
- (4) The structure, organization and supervision of the courts.

JURISDICTION EXERCISED BY THE JUVENILE AND FAMILY COURTS

The jurisdiction of the juvenile and family courts falls into three categories:

- (1) That relevant to the conduct of the child (so-called juvenile delinquency);
- (2) The conduct of adults toward the child (contributing to juvenile delinquency);
- (3) The relevant obligations of parents towards one another and their children.

General Jurisdiction of Juvenile and Family Courts

Under the Ontario law a juvenile and family court,

“3. (a) is a juvenile court for the purpose of dealing with juvenile delinquents so soon as the *Juvenile Delinquents Act* (Canada) is proclaimed in force in the area for which it was established and it has all the powers vested in a juvenile court under that Act:

(b) has power to try any child charged with any offence against the laws of Ontario; and

(c) has power to deal with all cases where jurisdiction is conferred by any Act upon a juvenile court or a judge thereof or upon a juvenile and family court or a judge thereof.”¹⁰

Juvenile Delinquents Act

Under the Juvenile Delinquents Act of Canada,¹¹ which applies in Ontario to children apparently or actually under the age of sixteen years, a child is a delinquent if he or she violates any provision of the Criminal Code, or any provincial or federal statute or any municipal by-law, or is guilty of sexual immorality or any similar form of vice, or is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any federal or provincial statute.¹²

A child of compulsory school age who is habitually absent from school is also treated as a juvenile delinquent.¹³

The application of the legal term “juvenile delinquent” to a range of offences, extending from murder to unlawfully riding a bicycle on the sidewalk, surely manifests a poverty of legislative imagination and draftsmanship.

If a child is found to be a juvenile delinquent, the court may take one or more of several courses in disposing of the case. These include suspending final disposition, levying a fine, committing the child to the care of a probation officer, placing him in a foster home or in charge of a Children’s Aid Society, or committing him to an industrial training school.¹⁴ It is ludicrous that anyone should have power to send a child to an industrial training school for any breach of a city by-law or of a provincial statute, while an adult may only be fined a nominal amount.

If a child is charged with doing an act which would constitute an indictable offence, and the child is apparently or actually over the age of fourteen years and under the age of sixteen, the court may in its discretion order that the child be

¹⁰R.S.O. 1960, c. 201, s. 3.

¹¹R.S.C. 1952, c. 160.

¹²*Ibid.*, s. 2 (1) (a)(h).

¹³Schools Administration Act, R.S.O. 1960, c. 361, s. 15 (5), as amended by Ont. 1961-62, c. 130, s. 2(2).

¹⁴Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 20.

proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code. But such course shall not be followed unless the court is of the opinion that the interests of the child and the good of the community demand it.¹⁵

Juvenile court judges have a wide jurisdiction to try adults for contributing to juvenile delinquency,¹⁶ and to impose penalties on parents or guardians of juvenile delinquents.¹⁷

Apart from the express jurisdiction exercised under the Federal Act, the provincial Juvenile and Family Courts Act provides that "every judge and deputy judge of a juvenile and family court is *ex officio* a magistrate in and for the Province of Ontario".¹⁸ By an order in council, juvenile and family court judges who are not otherwise county or district court judges or magistrates, are authorized to exercise the jurisdiction of a magistrate under Part XVI of the Criminal Code, that is, the trial of indictable offences by a magistrate on the election of the accused, or in certain cases without his election. We shall discuss the function of the juvenile and family court judges under this extended jurisdiction later.

In addition to jurisdiction relative to the enforcement of the criminal law, juvenile and family court judges exercise judicial powers under several Ontario statutes. The principal ones are:

Training Schools Act, Ont. 1965, c. 132;

Deserted Wives' and Children's Maintenance Act, R.S.O. 1960, c. 105;

Child Welfare Act, Ont. 1965, c. 14;

Parents' Maintenance Act, R.S.O. 1960, c. 284;

Children's Maintenance Act, R.S.O. 1960, c. 55;

Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1960, c. 346;

Minors' Protection Act, R.S.O. 1960, c. 243;

¹⁵*Ibid.*, s. 9(1).

¹⁶*Ibid.*, s. 33.

¹⁷*Ibid.*, s. 22.

¹⁸R.S.O. 1960, c. 201, s. 5a, as enacted by Ont. 1960-61, c. 42, s. 3.

Enforcement of Supreme Court Orders — Juvenile and Family Courts Act, R.S.O. 1960, c. 201;
 Schools Administration Act, R.S.O. 1960, c. 361.

The case load on these courts is indicated by the disposition of cases during the year 1966. The following table shows the number of cases disposed of under the relevant statutes.

A. Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 20 (Juvenile Delinquency)	16,357
B. Juvenile Delinquents Act, ss. 33 & 34 (Contributing to Delinquency)	642
C. Training Schools Act, Ont. 1965, c. 132	602
D. Deserted Wives' and Children's Maintenance Act, R.S.O. 1960, c. 105	12,887
E. Child Welfare Act, Ont. 1965, c. 14	13,106
F. Parents' Maintenance Act, R.S.O. 1960, c. 284	14
G. Children's Maintenance Act, R.S.O. 1960, c. 55	103
H. Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1960, c. 346	793
I. Criminal Code — s. 231	2,711
J. Criminal Code — s. 157	162
K. Criminal Code — s. 186	578
L. Criminal Code — s. 717	282
M. Minors' Protection Act, R.S.O. 1960, c. 243	41
N. Enforcement of Supreme Court Orders — Juvenile and Family Courts Act, R.S.O. 1960, c. 201, s. 20	198
O. Schools Administration Act, R.S.O. 1960, c. 361	439
P. Breaches of recognizances, access orders, etc.	1,400
TOTAL	50,315 ¹⁹

To these must be added 7,787 cases of maintenance arrears or applications to vary maintenance orders previously made. During the year, eighty-three juveniles were committed to be tried in the ordinary courts under section 9 of the Juvenile Delinquents Act.²⁰

¹⁹Annual Report of the Juvenile and Family Courts (1966).

²⁰R.S.C. 1952, c. 160.

It is estimated that the volume of work in the juvenile and family courts will continue to grow at a rate of approximately two-and-one-half times as fast as that of the population increase. This has been the experience over the past ten years in some of the larger cities and counties. Many urban areas are growing in population at a rate of three per cent per year, which means that the total number of cases heard will increase about seven and one-half per cent per year and will double in ten years or less. Many areas are growing more rapidly than this.²¹

These estimates only relate to the increase in the volume of work of the courts in the exercise of their existing jurisdiction. It is not improbable that the present jurisdiction will be extended in the future to cover such matters as custody, adoption or guardianship of infants, together with other matters which are peculiarly related to family affairs.

The purposes and functions of the juvenile and family court are quite different from those of the ordinary courts of justice. The rigid procedural requirements of the ordinary courts would in some measure frustrate the social purposes of juvenile and family court. In seeking to accomplish its social purposes, the court must not overlook the protection of essential civil rights. The adversary system has shortcomings as an instrument to produce the best results in juvenile courts, but the legal safeguards which are assured in a good adversary system are not to be diminished. The standard of parental care of a juvenile, laid down by the Juvenile Courts Act for the treatment of juveniles, is by no means appropriate for the trial of adult offenders in the juvenile court, nor for the determination of the paternity of children nor the fixing of maintenance nor kindred matters which not only impose heavy monetary obligations but which decide human relations and human values beyond monetary valuation.

The wisdom of conferring on all juvenile and family court judges the jurisdiction of magistrates is questionable. By an informal direction from the Attorney General, certain

²¹Brief of the Department of the Attorney General to Select Committee on Youth, November 9, 1965, 6.

criminal charges against adults are proceeded with in the juvenile courts. These involve charges of failing to provide necessities for children,²² common assault,²³ and corruption of children.²⁴ The intention of the directive is that in so far as these offences relate to the family relationship they should come before the juvenile court judges in their capacity as magistrates. It is questionable whether this indirect means of conferring jurisdiction on juvenile court judges to try indictable offences with the election of the accused, or, in the alternative to hold preliminary hearings, is wise.

PROCEDURE

Proceedings in the juvenile and family court relate to jurisdiction over five main categories of trials:

- (1) Trials of young persons;
- (2) Trials of adults for offences in respect of young persons;
- (3) Trials of adults for criminal offences in which young persons may or may not be involved, e.g., section 186 of the Criminal Code;
- (4) Trials of civil matters involving young persons, e.g., maintenance and custody;
- (5) Trials of civil matters in which young persons may or may not be involved, e.g., maintenance of a wife.

These may be subdivided, but for our purposes they are sufficient to demonstrate that all the jurisdiction exercised in the juvenile and family courts cannot be properly exercised under the same rules of procedure. The trial of juveniles is less than one-third of the work of these courts. The procedure in these cases is quite different from that which should be applied in other cases. Strict adherence to the procedure of the ordinary courts might well work to the detriment of the child. The function of the judge is not so much to determine guilt as to find out the underlying causes which have brought the child before the court, and when these have been deter-

²²Crim. Code, s. 186.

²³*Ibid.*, s. 231.

²⁴*Ibid.*, s. 157.

mined to prescribe treatment. He is a social physician charged with diagnosing the case and issuing the prescription. This function cannot be properly performed if he is surrounded by too many legalistic trappings; nevertheless, there must be some basic ones.

On the other hand, where children are not being tried, the fundamental procedures of the courts designed to protect civil rights should prevail, but there should be some emphasis on social objectives that cannot be imported into the ordinary courts. It is most difficult to lay down specific rules for these courts which would adequately protect the civil rights of those appearing before them, without unduly limiting the courts' social functions.

The Committee appointed by the Federal Government in 1961 to consider the problem of juvenile delinquency in Canada, and to "make recommendations concerning steps that might be taken by the Parliament of Canada to meet the problem of juvenile delinquency in Canada",²⁵ was unable to be more specific on procedure than to recommend that "appropriate steps should be taken to provide more adequate guidance to juvenile court judges on matters of procedure than they now receive".²⁶ The rule of thumb of the individual judge is not sufficient.

We recommend that a procedural Rules Committee be established to make general rules of procedure to be followed by juvenile and family court judges in all matters coming within the provincial jurisdiction, and to confer with the proper federal authorities with a view to establishing suitable rules concerning those matters that are exclusively within the federal jurisdiction. It is not suggested that rigid rules be evolved which would place undue restriction on the attainment of the social objectives of these courts, but any social philosophy that excludes adequate protection of civil rights is a dangerous one. The procedural problem with juvenile and family courts is not very different from the procedural problems of judicial and administrative tribunals, which we discuss in Chapter 14. There we recommend as the solution to that

²⁵Report of the Committee on Juvenile Delinquency in Canada (1965), 2.

²⁶*Ibid.*, 291, recommendation 56.

problem the appointment of a Statutory Powers Rules Committee which would have power to make rules of procedure appropriate to individual tribunals.

The Rules Committee for the juvenile and family courts should be so constituted as to have adequate representation from the judges of those courts, those engaged in different aspects of social work in connection with the courts, the legal profession and the public.

The rules should not be the same for the trial of juveniles as for the determination of the responsibility for the maintenance of or of the paternity of children. It should be a matter for the Committee to sort out the many powers exercised by juvenile and family court judges and to provide procedural guidance for them and adequate safeguards for the rights of individuals, applying the principles set out elsewhere in this Report. Juveniles, parents, husbands, wives, putative parents and those making claims against putative parents, all have civil rights to be protected. To dispense justice according to law is a function of the juvenile and family court, just as it is of any other court.

JURISDICTION

Under section 1(1) of the Deserted Wives' and Children's Maintenance Act,²⁷ a husband who has deserted his wife without having made adequate provision for the maintenance of her and their children, and who is able to do so in whole or in part, may be ordered by a magistrate or a juvenile court judge to pay such a sum at set intervals as is deemed proper, having regard to all the circumstances.²⁸ Under this section there is no limit on the amount that the husband may be ordered to pay for the maintenance of his wife and the section does not place a limit on the amount that a husband and father may be ordered to pay for the maintenance of his children. However, where a father deserts a child, as distinct from deserting both his wife and children, the amount that the father may be ordered to pay for the support of a child under section 2 is limited to \$20 per week for each child.²⁹

²⁷R.S.O. 1960, c. 105.

²⁸*Ibid.*, s. 1(1).

²⁹*Ibid.*, s. 2(2).

The difficulty does not end there. Under section 1 (1), the proceedings under the Act are commenced by a summons issued in Form 1 which is intended to apply to proceedings under both sections 1 and 2. The form reads:

FORM 1

The Deserted Wives' and Children's Maintenance Act

(Section 1 (1))

SUMMONS

County (or District)

of

To A.B., of

Whereas application has this day been made by your wife (or child), C.B., to the undersigned Justice of the Peace for for a summons under *The Deserted Wives' and Children's Maintenance Act*, for that you have wilfully refused or neglected to maintain your wife (or your wife and family, *as the case may be*) or your child, and have deserted your wife and child. These are, therefore, to command you to appear before a magistrate or judge of the juvenile and family court (*as the case may be*) at on the day after the service hereof, at the hour of in the noon, to show cause why an order should not be made against you, to pay to your wife for her support (or for the support of her and and your family, *as the case may be*, or to your child for his support), such sum not exceeding the rate of \$20 weekly (*where application is for maintenance of wife, omit the words and figures "not exceeding the rate of \$20 weekly"*), as is considered to be in accordance with your means and with the means of your wife (or child).

Given under my hand and seal this day of, 19.....

.....(L.S.)
Justice of the Peace.

This form indicates that the limitation of \$20 per week per child applies to an order made under section 1. The form does not refer to section 2.

The legislation is in a confused and unsatisfactory condition. Substantive legal rights should not be determined by procedural forms. If it is intended that the limitation of \$20 per week for maintenance of a child should apply to orders made under section 1, it should be so stated in the text of the section. In any case the limitation was put in the Act when it was enacted in 1922.³⁰ The purchasing power of the dollar has so changed in forty-five years that \$20 per week may be an entirely inadequate allowance in certain cases. The limitation should be removed.

APPOINTMENT AND QUALIFICATIONS OF JUVENILE AND FAMILY COURT JUDGES

There are no legal qualifications required for judges of juvenile and family courts. The Juvenile and Family Courts Act provides:

"4. (1) The Lieutenant Governor in Council may appoint one or more judges of a juvenile and family court who shall hold office during good behaviour."³¹

By virtue of the Public Service Act, 1961-62,³² which is incorporated into the provisions of the Juvenile and Family Courts Act, ³³ a judge shall retire upon attaining the age of sixty-five years. He may be reappointed by the Lieutenant Governor in Council for successive periods not exceeding one year, until he attains the age of seventy years. Apart from the age of retirement there are no special qualifications laid down for the occupants of the office. Once a man is appointed, the tenure is dependent only upon good behaviour.

Since no special qualifications or terms of office are required there is wide variation in the educational standards, training and background of the judges of the juvenile and

³⁰Ont. 1922, c. 57, s. 3(1).

³¹R.S.O. 1960, c. 201, s. 4(1), as amended by Ont. 1964, c. 51, s. 1(1).

³²Ont. 1961-62, c. 121, s. 10(1).

³³R.S.O. 1960, c. 201, s. 4 (5), as amended by Ont. 1964, c. 51, s. 1 (4).

family courts of Ontario. Of the seventy-three judges presiding over forty-nine juvenile and family courts, fifty-two are part-time judges and twenty-one are engaged on a full-time basis. Seventeen are without legal training. Eight of the judges are county court judges, and thirty-nine are magistrates performing their ordinary duties as magistrates. All of these by definition act only as part-time juvenile court judges. Of the thirty-nine magistrates, six are without legal training. Of the remaining twenty-six juvenile court judges who are neither county court judges nor magistrates, twenty-one are on a full-time basis, and eleven of these are without legal training.

In a report made to the Attorney General in 1961, E. H. Silk, Q.C., then Assistant Deputy Attorney General,³⁴ it was urged that the practice of appointing magistrates and county court judges as juvenile and family court judges be discontinued. In the report it was recommended that future judges should be restricted to those having legal training. The validity of Mr. Silk's criticisms was recognized by the Attorney General of the day in a statement in the Legislature:

"The present system is working out satisfactorily in many cases but in some cases is not too satisfactory, because of interference with the time of what should be regarded as the principal responsibilities of those juvenile and family court judges who are also county court judges or magistrates. In some cases it makes time demands which render it unfeasible for the judge to give adequate time to his juvenile and family court work.

Altogether the situation in every part of the province is perhaps not consistent with the important place which the juvenile and family courts have now gained in our court organization. . . ."³⁵

On that occasion the Attorney General introduced an amendment to the Juvenile and Family Courts Act, now section 16a, which was designed "to render practical a system of full-time, trained judges for the juvenile and family courts".³⁶ The substance of this amendment will be considered later.

³⁴Report to the Attorney General for Ontario on the Jurisdiction of County and District Courts (1961).

³⁵Legislature of Ontario Debates, 1961-62, Vol. 1, 511.

³⁶R.S.O. 1960, c. 201, s. 16a, as enacted by Ont. 1961-62, c. 67, s. 4.

In effect Mr. Silk's report and the Attorney General's statement endorsed the principle that all juvenile and family court judges should be legally trained and that the office ought not to be held by judges and magistrates.

The objectives contained in these recommendations have not been attained; in fact the contrary is true. In 1961 out of fifty-nine juvenile and family court judges, thirty-three were magistrates, eight were county court judges, and of the balance seven were lawyers and eleven non-lawyers. Today thirty-nine magistrates act as juvenile and family court judges and seventeen of the judges are without legal training. Now as then, eight of the juvenile and family court judges are county court judges. Convenience appears to have dictated the appointment of magistrates and county court judges to occupy the juvenile and family court bench. Apart from the Municipality of Metropolitan Toronto and the City of Windsor, the courts have been constituted on a territorial or geographical basis without regard to population or volume of work. County or district boundary lines have been followed. In many jurisdictions there is not sufficient work to occupy the time, or justify the appointment, of an independent full-time judge.

As a convenient solution, such work as there is has been transferred to the county or district court judge or to the magistrate, as the case may be, or alternatively someone has been appointed on a part-time basis. The peculiar and important jurisdiction and functions of a juvenile and family court judge are not things to be dealt with on a basis of convenience. They go to the very root of grave social problems affecting rights of individuals, problems much greater and more important than many of those dealt with in the ordinary civil courts. The juvenile and family court can no longer be considered to be merely an "extra" court or an added function of the county court judge or the magistrate. It is essential that these courts be presided over by judges who are appointed to that office and that office alone.

There are other serious problems arising out of the dual roles of part-time judges who are county or district court

judges or magistrates. In a letter to the Commission a magistrate who is required to perform these dual functions said:

"A separate judge for juvenile and family court should be appointed. I sometimes find that there is a conflict of interests arising in this manner. A husband and wife will appear before me in the morning in Magistrates Court, possibly where the husband has assaulted the wife, and in the afternoon in Family Court that the same people are there again with the wife making application for maintenance under the *Deserted Wives' and Children's Maintenance Act*. This happens quite frequently and I sometimes feel that the position of either the husband or the wife is prejudiced by advance knowledge that I would have sitting as judge of the Family Court gained earlier while sitting as magistrate."

Undesirable administrative difficulties arise where a county court judge acting as juvenile and family court judge gives a decision from which an appeal lies to the county court, for example, appeals from orders made under the *Deserted Wives' and Children's Maintenance Act*.³⁷

The change of attitude that is required when one moves from an ordinary court to a juvenile and family court is difficult. In the latter court the adversary system is of lesser importance. One is more concerned with the social welfare of the people appearing before the court and in seeking solutions to their difficulties within the social context, than is the case in other courts. A magistrate functioning within the framework of an adversary system under strict and formal rules requiring proof beyond a reasonable doubt, and where punishment must be a consideration, is engaged in an inquiry of an entirely different sort from one in which he seeks solutions where these attributes are not predominant features. It is not right to vest these different aspects of the administration of justice in the same judicial officer.

There is in addition a matter of considerable practical importance. The difficulties of the task of the Chief Magistrate of Ontario, in supervising and apportioning the work of the provincial magistrates, are multiplied where so many of the magistrates carry the additional responsibilities of juvenile

³⁷R.S.O. 1960, c. 105, s. 13.

and family court judges. The same difficulties arise to a lesser extent in the administrative duties of the Chief Judge of the county and district courts.

SPECIAL TRAINING FOR JUVENILE AND FAMILY COURT JUDGES

The problem of providing properly trained full-time juvenile and family court judges can only be solved by approaching it on a broad basis. There should be an end to piecemeal and improvised remedies. The solution does not lie in merely establishing a principle that all juvenile and family court judges should have legal training. A good layman is likely to make a very much better juvenile and family court judge than a poor lawyer who has obtained the appointment as an expression of gratitude for political services rendered. On the other hand, it is an unjustified encroachment on the civil rights of an individual to have his legal rights determined by a judge who is not adequately trained in the law. It is likewise an unjustified encroachment on the civil rights of an individual to have the social rights of children determined with too many legalistic trappings. A juvenile and family court judge should be specially trained for his duties.

A senior probation officer said that "the caliber of the bench must be raised and judges should be lawyers in all cases. The best probation and rehabilitation in the world will wither if the bench is poor." Legal training is not enough. This is an area in which the Continental system of appointing judges should be followed. There judges are trained as career judges. They are not appointed from the bar as in Canada. Experience in the actual practice of law is not likely to be of much value to a juvenile and family court judge. Nor will years of training in commercial, corporation and property law assist him.

A special training course should be established in at least one university in Ontario at which students could get training in all those branches of the law and the social sciences required for the good administration of juvenile and family courts. Following their graduation the students should be required

to serve as probation officers in these courts for at least five years. Following this service they should be eligible for appointment as juvenile and family court judges.

The province should be divided into juvenile and family court areas. A full-time judge should be appointed to serve in each area.³⁸ This will be more fully discussed later.

FINANCIAL ADMINISTRATION OF THE JUVENILE AND FAMILY COURTS

We refer to financial responsibility for the administration of juvenile and family courts as part of the machinery of justice in Section 5 of this Part. In the provisional districts this responsibility is largely borne by the province. Conversely, in the counties, the municipality, not the province, is responsible for virtually the entire cost of the machinery and operation of these courts.³⁹ As a result, the administration, including provision for facilities, is better in the districts than in the counties. What we say hereafter is applicable to the counties where the problems are acute.

In the absence of a special agreement between the province and the municipality pursuant to section 14a of the Juvenile and Family Courts Act,⁴⁰ the province appoints and fixes the salaries of all judges, professional and supervisory staff of the courts or attached to the courts, such as court clerks, court reporters and superintendents of detention homes, but the municipality pays the salaries. On the other hand, the municipality appoints and pays all junior clerical and auxiliary staff, such as stenographers, typists and clerks.

The municipality is responsible for providing pensions, hospital and medical insurance, holidays with pay and other fringe benefits to all of these officers and members of the staff, except the judges, whether appointed by the province or not.⁴¹ The municipality is also required to provide a suitable court

³⁸See the Report of the Committee on Juvenile Delinquency in Canada, (1965), 289, recommendation 40.

³⁹If the municipality in a provisional district is served by a court established for that district, the province may require such municipality to contribute towards the cost of the court: Juvenile and Family Courts Act, R.S.O. 1960, c. 201, s. 18.

⁴⁰R.S.O. 1960, c. 201, s. 14a, as enacted by Ont. 1966, c. 75, s. 1.

⁴¹*Ibid.*, s. 14, as amended by Ont. 1961-62, c. 67, s. 2 and Ont. 1964, c. 51, s. 4.

room and offices, furniture, equipment and supplies for the judges and all other officers and members of the staff, and otherwise for paying all the expenses of the operation of the court.

In fact, the only expenses which the municipality does not pay in connection with juvenile and family courts are the salaries of probation officers appointed by the province under the Probation Act, and the expenses of clerical and other assistance for these officers. These are paid by the province.⁴² On the other hand, where probation officers are appointed by the province under the Juvenile and Family Courts Act, they are paid by the municipality.

Because probation officers appointed under the Juvenile and Family Courts Act are limited to acting only in those courts, the great majority of probation officers acting in juvenile or family courts are appointed under the Probation Act. Thus they may be also assigned to any court of criminal jurisdiction. Of the 197 probation officers serving in 1966, sixteen were appointed under the Juvenile and Family Courts Act and 181 under the Probation Act.

The duality in the administration of juvenile and family courts, other than those in the provisional districts, has led to an intolerable situation.⁴³ Broadly speaking they result in inconsistencies and lack of uniformity in the administration of the juvenile and family courts in different parts of the province. The caliber of justice depends on the locality in which one lives. This is inevitable wherever individual municipalities are financially responsible for the administration of justice within their borders. Some counties are more affluent than others, and some view their responsibilities differently.

Some county councils may provide adequate staff and facilities, while in other counties the functions of the courts may be severely curtailed by marginal budgets. For example, in 1966, twenty-three juvenile and family courts reported that they had no facilities at all for a detention home for children, and three other courts reported that they used the county

⁴²Probation Act, R.S.O. 1960, c. 308, s. 4.

⁴³The problems created are discussed in Section 5 of this Part as part of the greater problem of the financial responsibility for the machinery of justice in Ontario. See pp. 866 ff. *infra*.

gaol for juvenile detention. This is done notwithstanding the provisions of section 7 of the Juvenile and Family Courts Act which requires a municipality to provide a detention home satisfactory to the Attorney General and section 13(1) of the Juvenile Delinquents Act, which provides that no child, pending a hearing under the provisions of the Act, shall be held in confinement in any county or other gaol, or any other place in which adults are or may be imprisoned, but shall be detained at a detention home or shelter used exclusively for children.⁴⁴ In 1966 nine juvenile and family courts reported that they had no facilities at all for psychiatric diagnosis or treatment.⁴⁵ That such situations can and do exist is a graphic indictment of the system which permits them. We quote again from the opinion of a senior probation official:

"The most pressing problems are to get the staff necessary to perform the rehabilitative job envisaged by the Act and for further facilities particularly psychological clinics and counselling. About 15 percent of all juveniles require psychological examination and the staff need the guidance of psychological counselling in such cases."

Inequality in the administration of justice applies not only to staff and court facilities, but also to the caliber of judges presiding over the various courts. This latter aspect of the overall problem was recognized by the Attorney General in 1961 as being "largely brought about by reason of the fact that the judge must be paid by a single municipality". This statement was made on the introduction of a bill to amend the Juvenile and Family Courts Act. Its purposes were stated to be:

"16a. (1) To render practical a system of full-time, trained judges for the juvenile and family courts,

(a) the Lieutenant-Governor in Council may make such regulations providing for the apportionment of the salaries and expenses thereof between or among municipalities as he deems fit; and

(b) the Attorney General may approve such arrangements as may, in his opinion, promote such a system."⁴⁶

⁴⁴R.S.C. 1952, c. 160, s. 13(1). See recommendation of The Select Committee of the Legislature on Youth, (1967), 267.

⁴⁵Annual Report of the Juvenile and Family Courts, (1966).

⁴⁶R.S.O. 1960, c. 201, s. 16a, as enacted by Ont. 1961-62, c. 67, s. 4.

The Attorney General concluded by saying, "ideally the situation might be to take care of this on a province-wide basis for all judges. This bill represents a compromise".⁴⁷ This is not a place for compromise.

In 1966 the Attorney General was given power to enter into an agreement with municipal councils to provide for the administration and operation of juvenile and family courts and for the payment and apportionment of their maintenance and operational costs.⁴⁸ Only one such agreement has been entered into. It is an arrangement between the province and the Municipality of Metropolitan Toronto. Under it the province assumes the entire control of the Metropolitan Juvenile and Family Court and pays ten per cent of the cost. The remaining ninety per cent of the maintenance and operational costs are borne by Metropolitan Toronto.

Unilaterally the Lieutenant Governor in Council may direct payment to any municipality of such portion of the cost of a court as he may determine out of money specially voted for that purpose.⁴⁹

These compromise arrangements are not adequate. The only satisfactory solution is for the province to assume the entire financial responsibility for the administration of the juvenile and family courts, including the provision and maintenance of all necessary facilities and the appointment and remuneration of all persons necessary to the administration of justice. This was advocated by the Association of the Ontario Mayors and Reeves and was one of the recommendations of the Select Committee on the Municipal Act under Mr. Beckett's chairmanship.⁵⁰

Mr. A. R. Dick, Q.C., Deputy Attorney General for Ontario, made a forceful appeal to the Select Committee of the Legislature on Youth, on November 9, 1965, when dealing with the situation in Metropolitan Toronto. His appeal has been approved by subsequent legislation. What he said has

⁴⁷Legislature of Ontario Debates, 1961-62, Vol. 1, 511.

⁴⁸R.S.O. 1960, c. 201, s. 14a, as enacted by Ont. 1966, c. 75, s. 1.

⁴⁹*Ibid.*, s. 19.

⁵⁰Second Interim Report of Select Committee on The Municipal Act, (March 1963), 51.

wide application to all municipalities outside the provisional districts:

“Mr. Dick: The Attorney General of the Province has the right to appoint and can dictate what staff you will have, but Metro is responsible for payment of salaries. . . . This is a problem we have been trying to work out. We would like to appoint staff and know what the exact requirements are. We set the salaries for the Juvenile Court Judges, psychiatrist, psychologist, probation officers, court reporters and Detention Home Superintendent. We have the authority to fix salaries, but we go to the municipality and ask if they can do this. . . . We are faced with the problem of how far can we go with the ratepayers’ money. This is a delicate area . . . to work out the type of facilities required and what the ratepayers can pay.

Mr. Peck [a member of the Committee]: Should not the Attorney General’s Department take over the responsibility of the administration through the province as a whole?

Mr. Dick: We have discussed this regarding all Family and Juvenile Courts in the province and this can be done for three or four million dollars. We can appoint staff [and] pay for them. . . .

Mr. Peck: The Juvenile and Family Courts are a great saver of people and three or four million dollars would be money well spent if these people were prevented from getting into trouble. We are probably spending much more in the long run. I am not saying that the [Metro] Juvenile and Family Court is not efficiently run . . . but when the municipal authorities have to strike out money from their budget it always seems to be from the Courts.”

Mr. Dick was dealing with a system under which two people working side by side doing the same work may be paid on different salary scales with different fringe benefits, dependent on whether they are paid by the municipality or the province.

The solution of the problem does not involve new outlays of money. It primarily involves getting the best service for money now expended. But if on proper organization adequate service to meet the needs of Ontario is not provided with the money that is now spent, more money will have to be spent. The lives of young people and the welfare of families are not areas for sacrifice.

ORGANIZATION AND STRUCTURE OF THE JUVENILE AND FAMILY COURTS

The Juvenile and Family Courts Act presently provides that the province may establish a court in and for a county, or counties, or for local municipalities separated from a county for municipal purposes, or for a combination of the above, or for one or more provisional districts or parts thereof.⁵¹ Only two municipalities have juvenile and family courts operating independently of the counties: Metropolitan Toronto and the City of Windsor. Otherwise, the juvenile and family courts are financed by the counties in or for which they are established and the counties, by agreement with the cities or towns within their borders, charge back to each city or town, on a population basis, its proportionate share of the cost.

There is thus no system in the organization or structure of the courts. On the contrary, they are mostly fragmented along county or geographical boundary lines which are quite unrelated to population, availability of adequate facilities and, in general terms, efficiency of operation. What is required is a central authority to organize, co-ordinate and supervise the staffing and administration of juvenile and family courts throughout the province so that they may operate as efficiently and conveniently as possible on a full-time basis. This, only the province can do. The province has taken an important preliminary step to this end by creating the office of chief judge of juvenile and family courts to perform functions comparable to those of the Chief Judge of the County and District Courts and of the Chief Magistrate. The chief judge has general supervisory powers over arranging sittings of the courts and assigning judges for hearings, as circumstances require.⁵²

The 1967 amendment was a good first step but reorganization of the courts on a broad basis is essential. If the province assumes the entire financial responsibility for them it will no longer be necessary to relate their jurisdictions to artificial municipal boundaries. The present jurisdictional boundaries should be replaced by court districts based upon population, convenience and facilities. Outside the larger urban areas this

⁵¹R.S.O. 1960, c. 201, s. 1.

⁵²*Ibid.*, s. 56, as enacted by Ont. 1967, c. 43, s. 1.

system would permit the consolidation of juvenile and family courts in terms of comparatively larger territorial jurisdictions. The employment of judges on a full-time basis, together with adequately trained staff, would be justified and required. In rural districts these judges would function itinerantly within their territorial jurisdiction, holding hearings at intervals as and when required in the principal centres of population, thereby making justice more conveniently available for both child and adult. With consolidation coupled with a full work load, adequate salaries for the judges and staff would be justified, the dignity of the courts would be enhanced and better justice would be dispensed.

Some of the problems of the juvenile and family courts are facets of the larger problem of financial responsibility for the administration of justice discussed in Section 5 of this Part.⁵³

RECOMMENDATIONS

1. As far as it is within the legislative competence of the province, rules of procedure should be formulated for the guidance of juvenile and family court judges by a Rules Committee appointed for that purpose by the Lieutenant Governor in Council. The Committee should be composed of representatives of the juvenile and family court judges, social workers, the legal profession, the Attorney General, and the public.
2. The province should assume the entire responsibility, financial and otherwise, for the administration of the juvenile and family courts.
3. The province should be divided into juvenile and family court areas, irrespective of municipal boundaries, having regard for the convenience of the public only.
4. A full-time juvenile and family court judge should be appointed for each area.
5. Proper detention facilities should be provided for each juvenile and family court area.

⁵³See pp. 866 ff. *infra*.

6. A special training course should be established in at least one university to train students in all branches of the relevant law and social sciences to qualify them for appointment as juvenile and family court judges, after five years' service as probation officers in juvenile and family courts.
7. If sufficient qualified graduates are available, such qualifications should be a statutory requirement for the appointment of a juvenile and family court judge.
8. Juvenile and family court judges should be appointed to that office and that office alone.
9. There should be a central authority to organize, co-ordinate and supervise the staffing and administration of juvenile and family courts throughout the province so that they may operate as efficiently as possible and as conveniently as possible on a full-time basis. This the province must do.
10. The jurisdiction of magistrates should not be conferred on juvenile and family court judges.
11. The Attorney General, by his direction, should not be able to confer jurisdiction on juvenile and family court judges to try indictable offences with the election of the accused, or to hold preliminary hearings.
12. The procedural rules should not be the same for the trial of juveniles as for the determination of responsibility for maintenance, or for the paternity of children.
13. There should not be power to send a child to an industrial training school for breach of a city by-law or a provincial statute.
14. The term "juvenile delinquent" should be abolished as far as it applies to provincial offences.
15. The limitation of \$20 per week maximum that a father may be ordered by a magistrate or juvenile court judge to pay for the maintenance of a child, should be removed.
16. A standard of salaries for juvenile and family court judges equal to those of magistrates should be established and maintained.

We have refrained from discussing the broad question of the trial and treatment of juveniles as that subject is one coming substantially within federal jurisdiction. It is, however, a subject that is closely related to those aspects of the juvenile courts over which the province has legislative power. For the guidance and use of those who will have to consider the recommendations contained in this Report and for the future development of the juvenile courts in relation to the family courts, we have added as an Appendix to this chapter a most useful research paper prepared for the Commission, in which some of the available relevant material dealing with procedure in juvenile courts is digested and discussed.⁵⁴

⁵⁴The Ontario Law Reform Commission is making an exhaustive study of family law in all its aspects.

APPENDIX TO CHAPTER 40

PROCEDURE IN THE JUVENILE COURTS

In considering procedure for the juvenile courts, a review has been undertaken of some of the relevant articles and texts published in England and the United States, and some articles which have appeared in Canadian periodicals and are of little assistance. The American commentators during the last ten years have taken a special interest in the legal procedure in juvenile courts, as distinct from procedure in domestic courts. This interest has been heightened by two recent decisions of the Supreme Court of the United States, the first in the *Kent* case and the second in the *Gault* case, both of which will be referred to later.

In the United States, the courts and the commentators take a very hard-line approach to the question of procedure in the juvenile courts. To put it succinctly, the American viewpoint now is that all of the individual protections afforded to an accused adult pursuant to the Constitution of the United States should likewise be afforded to a child in juvenile court proceedings. On the other hand, some English commentators take a different point of view and feel that the formality of a criminal trial does not accord with the theory of the juvenile court as a social court whose purpose it is to have regard for the welfare of the child.

Barbara Wootton

The dichotomy of thought between the Americans and some English commentators is well illustrated in an article by Barbara Wootton.¹ The article points out that in England a child below the age of ten is conclusively presumed by law to be unable to understand the difference between right and wrong; between the ages of ten and fourteen there is a rebuttable presumption to the same effect, so that if a child successfully pleads that he did not know that what he did was wrong he must be found not guilty. It is pointed out that in England most children appearing in juvenile court are not represented by counsel.

Miss Wootton states the dilemma of the juvenile courts to be as follows:

"For on the one hand the English Juvenile Courts are created in the image of courts of summary jurisdiction and bound by the rules of criminal procedure; and on the other hand they are expressly enjoined to have regard to the welfare of the children

¹*The Juvenile Courts*, [1961] Crim. L. Rev. 669.

who appear before them. In the attempt to discharge both halves of this dual function it would seem that the courts are sometimes required to travel simultaneously in opposite directions.”²

In Miss Wootton’s view, if the court is to perform a proper social function, treatment should be administered only after a thorough investigation, and not after a formal legal trial which, she claims, is so often misunderstood by the child. She puts the proposition this way:

“... if the welfare, not the punishment, of the child is the governing consideration, the safeguards of the criminal trial become irrelevant: that is the crux of the matter.”³

In advocating this proposition, Miss Wootton comes close to the current American philosophy, discussed below, whereby the hearing is divided into two segments: the fact-finding hearing and the dispositional hearing.

Miss Wootton noted that in 1908, when English juvenile courts were developed, there was almost a total absence of social facilities available to care for young children in trouble. Today, she said, there are many social institutions and bodies available to render assistance to children in need of it. She advocated substituting an educational for a penal setting, in which case the need for special court procedure would in her view disappear. She would have special schools to which the child “goes away to” rather than is “put away in”. She said:

“Today the variety of facilities available outside the judicial machine for dealing with the problem child or the child with a problem is positively dazzling. In face of this luxuriance it is hard indeed to believe that it can still be necessary to bring such children before the courts. . . .”⁴

Kilbrandon Report

On May 29, 1961, The Honourable Lord Kilbrandon was appointed the chairman of a committee “to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles”. The committee submitted its report on January 10, 1964.⁵

In Scotland, at the time of the writing of the report, no uniform system of juvenile courts was in existence. The work

²*Ibid.*, 670.

³*Ibid.*, 673.

⁴*Ibid.*, 677.

⁵Report of the Committee on Children and Young Persons, Scotland (1964), Cmnd. 2306.

of the juvenile courts was divided among four distinct types of courts: the Sheriff Court presided over by a single legally qualified judge (known as the sheriff); the Burgh (or Police) Courts presided over by a single bailie, who holds office for three years and is an elected town councillor, appointed to his office by his fellow councillors; the Justice of the Peace Courts presided over by lay justices; and the specially constituted Justice of the Peace Juvenile Courts in four centres. These are all regarded as courts of criminal law. When a criminal prosecution was instituted, either the juvenile admitted his guilt, or the court, after a trial, made a "finding of guilt" or of innocence. Even though the juvenile court procedure was modified in certain respects in the interests of simplicity and intelligibility for the juvenile, there was no fundamental alteration in the principles of criminal procedure.

Statute law in Scotland requires a court dealing with a juvenile to have regard to the welfare of the person before it. This concept "appears to have similarities to the civil law concept in relation to custody and guardianship, i.e., it presupposes in relation to the parents that in certain circumstances their wishes may be overridden and the child removed from their control—society *pro tempore* assuming parental rights . . . it presupposes the same concept—*in loco parentis*—the measures being imposed on the child as by a father on the basis, 'It's for your own good' . . . [welfare] implies a 'preventive' or protective concept rather than judging the offence and the punishment which it deserves."⁶

The committee was of the view that there were serious shortcomings in the Scottish juvenile court system resulting from the fact that it combined the characteristics of a court of criminal law with those of a specialized agency for the treatment of children in need. It felt that it was necessary to clearly separate the two issues of fact-finding, and the consideration of the measures to be applied where the basic facts are established. The committee, therefore, recommended that juvenile panels be established whose sole function would be the disposition of the proper treatment to the juvenile. The panel would assume jurisdiction only after the juvenile has admitted his guilt or his guilt has been determined by an appropriate court of law, the Sheriff Court. The committee noted that as the basic facts actually were in dispute in only a limited number of cases, referrals to the Sheriff Court to determine the facts would not be many.

It was recommended, therefore, that all existing juvenile courts be abolished and that all juveniles under the age of sixteen should be removed from the criminal courts and come under the jurisdiction of the juvenile panels, which would be empowered

⁶*Ibid.*, 28-9.

to order special measures of education and training according to the needs of the juvenile concerned. In any case, where a dispute as to the facts exists, the dispute is to be resolved by the Sheriff Court. If the dispute is resolved against the juvenile, the matter is to be then referred to the juvenile panel. It was proposed that there be a right of appeal from the decision of the panel to the Sheriff (sitting as a judicial officer), and to the Court of Sessions on questions of law arising from decisions by the Sheriff. In referrals or appeals to the Sheriff, it was recommended that there be a right of legal representation.

The proposed juvenile panel would not be a court of law. It would be a lay body comprising persons specially qualified with regard to the problems of children. The panel would be a completely independent agency whose members should be appointed by the Sheriff. The committee felt that it was essential that the panel always consider the child's need for special measures of education and training and should accordingly be empowered to exercise a continuing jurisdiction over all children referred to it, subject to a statutory upper age limit, and within that period should have the discretion to alter, vary, or terminate the measures initially applied in the light of the child's progress and response.

Juvenile Delinquents: Harvard Law Review

A lengthy Note recently published in the Harvard Law Review authoritatively discusses juvenile court procedure in the United States.⁷ This Note was prepared by a number of students at the Harvard Law School who conducted extensive surveys as to juvenile court procedures, and procedures relating to juveniles generally, in such places as Boston and Cambridge, Massachusetts, Chicago, Cleveland, Denver, Kansas City, Missouri, Los Angeles, Milwaukee, Minneapolis, New York City, Philadelphia, Sacramento, Salt Lake City, San Francisco, Toledo, Tucson, Washington, D.C. and Wisconsin Rapids.

The authors indicate that the first juvenile courts in the United States were established in 1899 in Chicago, Denver and Cleveland. They refer to a leading article by Julian Mack⁸ and quote his now well-known proposition:

"The problem for determination by the judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."⁹

⁷*Juvenile Delinquents: the Police, State Courts, and Individualized Justice*, 79 Harv. L. Rev. 775 (1966).

⁸*The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).

⁹79 Harv. L. Rev. 775, 776 (1966).

This proposition of Judge Mack has been referred to as the philosophical ideal underlying the institution of the juvenile courts. The authors state that, taking the proposition of Judge Mack to be the proper statement of the purpose of the juvenile courts, "many commentators have begun to wonder whether the juvenile does not relinquish too many of his rights in exchange for an unfulfilled promise of treatment rather than punishment".

The authors point out that in the cities studied by them similar procedures are followed when a juvenile is suspected of having committed a crime, and that these procedures are rather typical of those followed in many other large centres in the United States. Most of the large police forces have what is known as a Youth Bureau. When a juvenile is taken into custody the practice is for an officer in the Youth Bureau to deal with the case. While this practice does not appear to be legislatively sanctioned in any of the cities, nevertheless the officer in charge of the Youth Bureau conducts a type of hearing, after which he will decide either to let the youth return to his home with a warning, or to refer the matter to the juvenile courts. The juvenile courts have an In-take Bureau generally run by the probation services in collaboration with the court, wherein the youth is again interviewed if his case is referred to the juvenile courts. The in-take division will then determine whether to let the youth go home with a warning, or whether the matter should be referred to the court for a hearing.

Apparently, what often decides whether or not there is to be a trial is whether or not the juvenile "confesses" to the Youth Bureau or to the In-take Bureau. In other words, if he admits the offence of which he is suspected, and it is not a serious offence, he will be released. On the other hand, if it is a serious offence which he has admitted, or if he denies having committed the offence at all, a formal charge will be laid and the matter will be referred to the court for adjudication. The authors state that this practice prevails in "virtually all cities" in the United States.¹⁰ They state that in 1964 in the United States, the F.B.I. reported that of all juveniles taken into custody, 47.2% were handled by police Youth Bureaus, 46.8% were referred to the juvenile courts, and the balance were handled by other agencies.

The authors prefer the in-take proceedings held by the officials of the juvenile court to the hearings held in the police Youth Bureau. Some of the in-take hearings are actually conducted by the judge, others by the probation officer, and in this manner about half of the cases referred to the courts are "settled" on this informal basis without the necessity of a trial. The children are

¹⁰*Ibid.*, 776.

either sent home unconditionally, or sent home on the condition that certain treatment be received or that certain supervision be imposed upon them. This proceeding is said to be preferable to the one held by the police because the in-take personnel are usually trained and experienced in social work and they are generally under the immediate supervision of the juvenile court judge.

In the article it is stated that even though the original philosophy of the juvenile courts was to treat the offender with a view to salvaging him and making him a useful member of society, the theory of treatment has, over the years, become more a theory of punishment of the juvenile:

"Early Juvenile Acts provided for very informal court proceedings because the draftsmen did not want to subject children to the same procedures as hardened criminals, and because it was thought that the elaborate machinery of the Adversary system would interfere with the primary task of the court, rehabilitation. Appellate Courts have generally upheld the constitutionality of the informal approach on the ground that Juvenile Courts are not Criminal Courts. And many Juvenile Court personnel have come to accept the incompatibility of the ideas behind the Juvenile Court system and 'juvenile criminal trials' as an article of faith. But recently there has been a growing demand among commentators for providing the juvenile with procedural safeguards equivalent to those afforded adult defendants. It is argued that when the 'treatment' ultimately afforded a delinquent is in substance no different from punishments imposed on those found guilty in adult criminal trials, the view that procedural safeguards need not be provided to juveniles because the proceedings are 'civil' rather than criminal is merely a legal fiction."¹¹

The authors report that in most of the courts they studied counsel appears for the juvenile in about five per cent of the cases. However, in New York City counsel appears in the vast majority of cases. They report that the police, court officials and judges appear to actively discourage the retention of counsel on the ground that counsel will "interfere" by raising objections, which would ultimately result in a finding of not guilty. The authors put it in this way:

"Even judges who are not actually hostile to the presence of an attorney may expect him to assume a different role in the Juvenile Court from the one he would have in a Criminal Court. He is not to utilize 'technical objections' to obtain a finding of no delinquency. But rather he is to act as the servant of the court in the process of ascertaining the truth—a function that seems to entail actively encouraging his client to confess. Many courts

¹¹*Ibid.*, 790-91.

have emphasized that the attorney can perform a valuable function by 'interpreting the court's purpose and decision to the child or his parents' or 'working out an alternative plan of disposition'.¹²

Commenting on the qualities required of a judge and the relationship between the judge and the trained social workers making up the court's Probation staff, the authors observe:

"A professional social worker, the Probation Officer is answerable to an amateur—the judge. His professional self-confidence must suffer, and it is said that a Probation Officer's view of prudent treatment comes to coincide with that of his judge. He must introduce the court's purpose to the child, gain his confidence, and convince him that full disclosure of his past conduct will permit the court to plan the most beneficial program of treatment for him. At once a division of loyalty emerges: what he has learned the Probation Officer must divulge to the judge; but the judge may not share the Probation Officer's sympathies—and the Probation Officer who has little trust in his judge's election of treatments may find it difficult to believe his own assurances to the child that full disclosure is the best policy. . . ."¹³

And finally it is stated:

"The system designed to replace the traditional criminal courts rests on two hypotheses: that a degree of precision in predicting future behaviour is now possible, and that rehabilitation of those identified as in need of reform is a present reality. However, no satisfactory predictive device has as yet been developed: and, at least in the practice observed, screening decisions at all stages—police, in-take and court—are, basically, intuitive reactions. Almost invariably such decisions are made with the best of intentions; goodwill, compassion, and similar virtues are so admirably prevalent throughout the system that they tend to forestall criticism. But expertise, the key-stone of the whole venture, is lacking. . . .

Although it is beyond the scope of this Note to gauge the adequacy of existing treatment facilities—probation staff, institutions for confinement, and the rest—it must be pointed out that they have been the subject of extensive criticism, and the insufficiency of such facilities was a complaint in virtually every interview conducted. Of course, the ability of the behavioural sciences, now or in the future, to attain the goal of rehabilitation, is a moot question if society is unwilling or unable to commit the economic resources that the project requires.

To a growing number of those involved in the system no overhaul of the existing structure will be satisfactory; the great experiment has aborted, and it is now necessary to return to the 'legal' model even if an enlightened approach to the possible thera-

¹²*Ibid.*, 797-98. ". . . the presence of an attorney may be valuable, if only to assure the parties that they are being treated fairly." (798).

¹³*Ibid.*, 806.

peutic alternatives is not abandoned. And an independent development, the growing public consciousness of 'rights', may supply even more pressure for a return to legalism. . . . In a Juvenile Court geared to confession, [wide-spread denials of guilt] requiring the case against the child to be 'proved', will destroy the intimacy upon which informal procedures have been based."¹⁴

Professor Monrad G. Paulsen

Professor Monrad G. Paulsen, now a professor of Law at Columbia University, is regarded as one of the American authorities on the juvenile court process. In an early article¹⁵ he explored what the juvenile courts can do to protect more adequately the rights of the child, without sacrificing the benefits of juvenile courts for children.

In discussing the philosophy behind the creation of the juvenile courts, he states:

"Men of good-will created Juvenile Courts for the benefit and protection of children in the light of the appalling consequences visited upon youngsters by the criminal law [R]eform was accomplished by replacing notions of punishment with concepts of care and rehabilitation.

According to the philosophy of the Juvenile Courts Act, a child is not to be accused, but to be offered assistance and training by the state if there is some demonstrated need for it. The adjudication that state intervention in a child's life is necessary is not supposed to carry the stigma of criminal guilt [P]robationary supervision, not continued detention, is sufficient treatment in all but the most serious cases. In those relatively few instances which require institutionalization the child is supposed to be housed in such a way as to give him the rehabilitation and training he needs. The aim throughout is individualized treatment according to the needs of the youth, not punishment according to the seriousness of the act; redemption not retaliation. . . ."¹⁶

Professor Paulsen emphasizes that procedure in a juvenile case is much more informal than that in the criminal prosecution of an adult. But he accepts the proposition that a child is entitled to due process of law whether the juvenile court administers civil or criminal justice. However, he cannot accept the proposition that one should grant to the child all the safeguards of due process which protect the rights of an accused adult before his liberty can be taken away. He submits that the proper standard is that of "fairness" and that the proper inquiry should therefore be: "What does fairness require in a children's court case?"¹⁷

¹⁴*Ibid.*, 808-10.

¹⁵*Fairness to the Juvenile Offender*, 41 Minn. L. Rev., 547 (1957).

¹⁶*Ibid.*, 547-48.

¹⁷*Ibid.*, 550.

The author's views of procedure for the juvenile courts are as follows:

(1) Trial by jury in a juvenile court is not necessary as it would add "a good deal more formality to the Juvenile Court without giving a youngster a demonstrably better fact-finding process than trial before a judge".¹⁸

(2) The role of the juvenile court judge requires him to take a much more active part in the court room proceedings than judges ordinarily do. However, only judges who have the specialized skills to serve as juvenile court judges should preside in these courts.

(3) Having regard to the overwhelming number of statutes which require the trial of a juvenile to be held in private, "an open trial would operate as a check on arbitrary action by the courts; but the advantage would be purchased at the expense of punishing the juvenile by publicity".¹⁹

(4) In juvenile court witnesses ought not to be examined without an oath being administered, except in cases where the witness is a very young child.

(5) The trial of a juvenile ought not to be held in his absence, as some have advocated. Even though a court hearing is probably an enormous emotional disturbance to the child, it is none the less preferable that he be present.

(6) "A rule which requires alleged delinquents to be told that they need not testify at the hearing would be most unfortunate. The hearing ought to be a part of the treatment process, a function which it certainly cannot perform if the child is told that he need not talk to the judge or anyone else about the situation in which he finds himself. If the juvenile proceeding is truly protective and non-accusatory in character, there can be little need for a privilege against testifying similar to the privilege against self-incrimination. The latter privilege is tied to the accusatorial scheme of the criminal law."²⁰ However, there must be a rule that anything which a juvenile says in juvenile court proceedings cannot be used against him in any subsequent proceedings.

(7) It is important for juveniles to be represented by counsel. One of the reasons is that juvenile proceedings are conducted behind closed doors. "It would not be a hasty guess to suppose that a judge's performance (and that of his staff) will be much more alert and careful under the gaze of a lawyer than otherwise. The greatest value of the attorney may be his very presence rather than his ability to give affirmative help."²¹ The right to be represented by counsel is one of the "real rights" which is very necessary. While a parent may be able sensibly to waive the right to counsel, a youth may not be able to do so intelligently on

¹⁸*Ibid.*, 559.

¹⁹*Ibid.*, 560.

²⁰*Ibid.*, 561.

²¹*Ibid.*, 571.

his own behalf. Hostile parents may waive the child's right to counsel through sheer perversity. A system of assigned counsel, legal aid or a public defender system for the juvenile is desirable.²²

Judge Orman W. Ketcham

In a recent article,²³ Judge Ketcham expressed the view that in the past ten years there had been a legal renaissance in the juvenile courts in the United States. He relates this renaissance to a decision of the United States Court of Appeals for the District of Columbia in 1956, which, in effect, pronounced the doctrine that there is a right to counsel in the juvenile courts. After this decision the appellate courts then began to have "second thoughts about the lack of legal procedure and due process of law in Juvenile Courts. The pendulum swung back—slowly at first and then with increasing speed. The legal renaissance in the Juvenile Courts was under way."²⁴

Judge Ketcham indicates the concern of the National Council of Juvenile Court Judges and the American Bar Association with the role of the lawyer in juvenile courts. He refers to a conference held in 1964 by the National Council of Juvenile Court Judges, the American Bar Association and the National Legal Aid and Defenders Association to discuss this problem. The conference concluded that the lawyer fulfils three main functions in the Juvenile Court:

- (1) To advocate and defend his client's proper legal rights;
- (2) To be his client's legal guardian, with special concern for his welfare and best interests; and
- (3) To be concerned, as an officer of the court, with the administration of justice.

It is stated that only twelve out of 136 accredited law schools in the United States have a specialized course in juvenile court jurisdiction; forty-eight have no coverage at all of this subject; and the remainder include juvenile court law as part of other courses. As a result, the conference urged law schools to develop counsel with real knowledge and expertise in juvenile court matters.^{24a}

²²Reference will be made later to the recently created office of Law Guardian in the Juvenile and Family Courts of the State of New York. See pp. 601-03 *infra*.

²³*Legal Renaissance in the Juvenile Court*, 60 Nw. U. L. Rev., 585 (1965-66).

²⁴*Ibid.*, 587.

^{24a}None of the law schools in Ontario has a specialized course in juvenile court jurisdiction. The Bar Admission Course does not have a course in that subject. Some coverage is given to the domestic aspect of the juvenile and family courts.

Judge Ketcham states that twenty-five per cent of all juvenile court judges in the United States are not lawyers. He is of the view that because "the legal renaissance in juvenile courts calls for legal rights blended with concepts of social welfare", all future juvenile court judges should be lawyers.

Judge Ketcham also makes reference to the courts that have been established in several large American cities which have proved effective in providing criminal adjudication, followed by rehabilitative procedures and vocational training geared to the individual needs of young people beyond the jurisdiction of the juvenile court system. These courts are known as the Youth Offenders Courts. They are specially designed to have jurisdiction over young people between the ages of sixteen and twenty-one who are old enough to be held accountable for their crimes, but too young to be consigned to long years of penal servitude.

Judge Ketcham feels that the legal revolution would result in several important social changes. His view is that if more strict rules of procedure were prescribed and followed by the courts, the young offender would develop the opinion that the laws apply to the courts as well as to himself, with the hoped-for result that greater respect for the law would be developed in young people. The Judge puts it this way:

"Perhaps the foremost of the social changes will be the emergence of the principle that each young person is an individual entitled for his own sake to civil rights and equal justice under the law. . . . Today's young people don't want paternalistic notions of *noblesse oblige* and 'do as I say, not as I do'. Each of them wants . . . individuality, emancipation and responsibility. . . . Acceptance of them by our Juvenile Courts as first-class citizens entitled to a full measure of individual due process of law may lay the groundwork for good citizenship, long after the relationship between probation officer and juvenile is forgotten.

First impressions, as we all know, are most important—often indelible. A boy in community trouble for the first time feels very much alone. Whether justifiably or not, he sees school authorities, police and court officials as demanding, judgmental and often hostile. In some instances, even his parents appear to be critical and antagonistic. The court-appointed attorney will often be the first 'outsider' to stand up for him. This can create a strong, new impression that the Juvenile Court law *serves the boy, too*, and is not just the agent of adult authority. . . .

Finally, the example of a Juvenile Court that operates under the restraint of due process of law and affords legal counsel to a youth in trouble may re-new in our children the respect for law courts and the judicial process which is said to be on the decline. At a time in history when public confidence in the law seems low, it is important that those persons legally called 'children'—a group comprising about 40% of the population—should

be educated in legal procedures by a well-respected Juvenile Court system which proclaims that ours is a government of laws not of men."²⁵

*Kent v. United States*²⁶

In a more recent article Professor Monrad G. Paulsen²⁷ discusses the case of *Kent v. United States* and reviews the history of the formation of the first juvenile court in 1899:

"Not only was the aim of a court for children to differ from that of the criminal courts; its way of going about things was to be changed as well. Procedure had to be 'socialized'. The purpose of the Juvenile Court is to prevent the child's being tried and treated as a criminal; all means should be taken to prevent the child and his parents from forming the conception that the child is being tried for a crime'. The respondent to a petition filed in his own interest replaced the defendant to a criminal charge filed in the interest of the state. Trials by jury should be permitted 'under no circumstances', because 'they are inconsistent with both the law and the theory upon which children's codes are founded'. Hearings were not to be 'public trials' lest youngsters be damaged by publicity. Little or no need would be found for the respondent to have a lawyer; 'the judge represents both parties and the law'. The proceedings were to be 'informal', or, as the original Illinois Act put it: 'The court shall proceed to hear and dispose of the case in a summary manner'. The rules of evidence governing criminal cases were not to be strictly followed. In part, they were to be rejected because the inquiry was to be broader than the relatively simple question: 'Did the child do it?' The inquiry was also to consider medical and psychological information, the 'impressions of trained observers', in order to understand the Reason Why. In part, evidentiary rules of exclusion were to be rejected because they derived from considerations of extraneous policy. For example, the rule excluding illegally obtained evidence would simply block information that might be essential to child rescue. The methods of the 'old common law' were to be abandoned and replaced by 'instruments forged by a jurisprudence which realizes that law, like medicine, is social engineering'. In short, the ordinary protections of a person accused of crime were hindrances to the achievement of Juvenile Court goals, not milestones on the path of human advancement.

Not to be overlooked is another aspect of the insistence on informality in court. The community has never been much concerned with the impact of the criminal procedure on the feelings of an accused. If he is terrified by the courtroom scene, so much the better. A malefactor might thus be convinced never to return.

²⁵60 Nw. U. L. Rev. 585, 595-96 (1965-66).

²⁶383 U.S. 541 (1966). This case was the first examination made by the Supreme Court of the United States of the procedure in the juvenile courts.

²⁷*Kent v. United States: The Constitutional Context of Juvenile Cases*, [1966] Sup. Ct. Rev. 167.

The reformers, on the other hand, sought to dispel the fear that can accompany a child's day in court. They perceived the appearance before the Juvenile Court judge as the beginning of the treatment process, a beginning that should not make a total job of serving a child's needs more difficult. If the state is to act like a father, its representative, the judge, should act like one at the hearing. The respondent child, Judge Mack said, should 'be made to feel that he is the object of (the court's) care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.'

The Juvenile Court would achieve its purposes through the work of a well-chosen judge and the qualified staff, particularly the staff of probation officers. The judge would see to it that the 'socialized' procedure disadvantaged no one. He was to adjudicate whether the respondent child had performed the acts alleged in the petition and to decide, with the help of his staff, what the child's needs were and how they could be met. The specifications for the ideal judge resulted in a tall order. Miriam Van Waters, writing in the early twenties, demanded, in addition to legal training, 'a thorough knowledge of psychology, mental hygiene, sociology and anthropology, at least those branches of anthropology that deal with criminology, cultural history of the race and racial traits and capacities. . . .'

For many reformers, including Judge Mack, 'Probation is, in fact, the key-note of Juvenile Court legislation'. Through the probation staff a child's re-education could be pursued with vigour, wisdom, and consistency. The institution of probation enabled the court to leave a child in his home while a treatment plan was followed. In short, probation performed the social case-work that a child and his family might need.

One final point. The hearings in court, the detention centres, the training institutions, were all to be quite separable from those employed for adults. The mixing of delinquents with adult offenders at any level was universally condemned."²⁸

The *Kent* case concerned a sixteen-year-old boy who, after being taken into custody, confessed to a number of robberies and a rape. He was, because of his age, within the exclusive jurisdiction of the Juvenile Court for the District of Columbia, but could be tried in the adult courts on the charges if the juvenile court judge "waived" jurisdiction after a "full investigation". The Kent boy was represented by counsel who opposed waiver and asked that the issue of waiver be tried. Without holding any trial of the issue, the judge of the juvenile court entered an order that "after full investigation, I do hereby waive" jurisdiction.

²⁸*Ibid.*, 170, 171.

Kent was accordingly transferred from the juvenile court to the criminal court, where he was found guilty on six charges of house-breaking and robbery and sentenced to prison for thirty to ninety years. He was found not guilty on the charge of rape by reason of insanity. The Supreme Court of the United States held that the case had been improperly transferred from the juvenile court to the criminal court on the ground that a proper trial of the issue concerning the question of waiver had not been held. The Supreme Court considered (*per* Mr. Justice Fortas) the waiver proceedings "critically important" for they determined vitally important statutory rights of the juvenile. Accordingly, waiver proceedings must be preceded by a hearing, including the right of access by counsel for the accused to social records and probation or similar reports, which presumably were considered by the court.

To Professor Paulsen, one of the critical comments made by the court was: "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." Another important feature of the judgment, in Paulsen's view, was the ruling by the court that social worker reports and probation reports compiled for the assistance of the court must be made available to counsel for the juvenile.

The warning issued by Mr. Justice Fortas, that a juvenile court judge's exercise of the power *parens patriae* was limited by the rule of law, is important. The admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness. Concerning procedure Professor Paulsen states:

"... While there can be no doubt of the original laudable purpose of Juvenile Courts, studies and critiques in recent years raised serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some Juvenile Courts . . . lack the personnel, facilities and techniques to perform adequately, as representatives of the state in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

It is probably true that some of the adult protections that the reformers sought to avoid could be introduced into the Juvenile Court without completely hampering its operation. . . . A constitutional right to a public trial has rarely been invoked. If a child properly advised by parents and counsel, wishes a public trial,

why should he not have it? In my view the reformers, in their desire to distinguish sharply between juvenile and criminal proceedings and in the hope that children would be processed as patients in a clinic or given social education as in a school, put too much emphasis on the need for informal procedure. The child and his parents are under no illusion. They know they are in court, not in a school or in a doctor's office. To find a court acting like a court may only bear out the expectations derived from television. Certainly, too, the reformers were mistaken about the opportunity for treatment presented by a few minutes in court. Not many today would agree that a judge who put his arm around a boy gains 'immensely in the effectiveness of his work'. If our methods work changes in the characters of delinquent children, they must embrace more sustained measures over a period of time. Medical and psychiatric treatment programmes, skillful probation services, soundly conceived 'friendly institutions' (if any exist), may do the work of character building. But the experience at the hearing will be quickly forgotten in most cases."²⁹

With regard to police procedures concerning juveniles, Professor Paulsen states:

"The most nettlesome question, raised on the facts but not decided in *Kent*, is whether the full reach of the limitations on police interrogation and search and seizure practice will extend to juveniles. These limitations enforced by the exclusionary evidence principle doubtless allow some guilty persons to go free. While we may agree, with general deterrence in mind—full enforcement of the law is not required for the law to have a deterrent effect—that it is better for many of the guilty to go unpunished than for an innocent person to be convicted, do we embrace the same attitude where children are concerned? There are at least two important points of difference. Almost no one regards an accused who is not convicted as an unlucky man. In the case of children it is possible to view a dismissal in Juvenile Court as a missed opportunity for correction and training. Second, is not the moral education, derived from a Juvenile Court experience, corruptive rather than re-generative if a youngster 'beats the rap' because of what will seem like a 'technical' rule—a loop-hole?³⁰

Professor Paulsen also considered the decision of the Supreme Court in the case of *Miranda v. Arizona*^{30a} in which it was held that interrogation and custody of an accused person can proceed only after he has been cautioned that he need not speak and told that he may have access to counsel before answering. Paulsen ques-

²⁹*Ibid.*, 186, 187.

³⁰*Ibid.*, 189.

^{30a}86 Sup. Ct. 1602 (1966).

tions whether this rule will or does apply to juveniles. He argues that it should. To use his words:

"It will seem more and more outrageous that the police may treat children more harshly than adult offenders . . . If a mature offender and a stripling aged sixteen rob a bank together, will we actually countenance a system that provides the older with counselling during questioning and the younger with none?"³¹

Joel F. Handler

An article by Joel F. Handler³² deals, in part, with the criticism that justice in the juvenile courts "actually encourages or precipitates deviant behaviour and destroys basic values and rights". The author reviews the history of the philosophy of the juvenile courts, and the present practice followed in most jurisdictions of hearings before police youth bureaus and juvenile court intake departments, and actual court hearings themselves.

Handler states that there are many criticisms of the juvenile court system in the United States, two of which are:

- (1) That the court, in deciding "guilt or innocence", relies on reports made to it by probation officers concerning the child. Such reports are often received in evidence and are not subject to examination by the child or his counsel. Eventually they often constitute "the basic findings of fact" of the court.
- (2) That the practice followed by Youth Bureaus of adjusting cases is not legally authorized. He says that whether or not an officer sends a child "on for trial" depends very often on the demeanour of the child—in other words, the threat of court proceedings is used to illicit confessions and co-operation.

With regard to procedures followed in the juvenile courts in the trial of cases, Handler says that as a result of the extremely informal procedures followed therein, the juvenile court judge has great discretion with regard to the procedures that are to be followed, and as to what evidence is or is not to be received. He says:

"Lodging such unfettered power even in the best of men should give one pause; yet, in the opinion of critics, the quality, interest and training of the Juvenile Court judges leaves much to be desired. The original understanding called for dedicated, highly-trained specialists of prestigious status. What has generally happened, however, is that the Juvenile Court is considered to be the lowest rung on the judicial ladder. Rarely does the court attract men of maturity and ability. The work is not regarded as desirable or appropriate for higher judgeships. . . ."³³

³¹[1966] Sup. Ct. Rev. 167, 191.

³²*The Juvenile Court and The Adversary System: Problems of Function and Form*, [1965] Wis. L. Rev. 7.

³³*Ibid.*, 17.

It is his view that the state of affairs which he outlines, together with heavy court calendars in the urban centres, effectively shift the decision-making from the court to the probation staff or the police. He feels that court hearings are usually very perfunctory and that the judge, in effect, rubber-stamps the findings and recommendations of the reports made by the court staff. In other words, he feels that the judicial hearing does not serve the purpose of detached, independent and conscientious fact-finding which is truly the role of a judge.

With regard to the informality of procedure, Handler says:

"In discussing the effect of the informality of procedure on the child, it appears that the effect is opposite to that intended. Instead of producing attitudes of rapport and trust (considered necessary for rehabilitation), the high degree of informality leads to confusion and lack of perception or understanding of rules and standards. In the eyes of the adolescent and the parent the officials seem all-powerful. Their decisions are completely personal and can turn on whim, anger or friendliness. The most logical defence to this display of unpredictable power—and the one most commonly used—is manipulation: 'play ball' to get on the good side of the police officer, the probation officer, or even the judge."³⁴

He next refers to the safeguards commonly found in the adversary system and finds that some or all of them are lacking in some of the juvenile courts. Handler refers to these safeguards as: a clear and definite charge; the separation of functions between the prosecutor and the judge; a meaningful right to counsel; the right of confrontation; proof by competent and relevant evidence; a relatively high degree of burden of proof; and, the right to appeal. He is critical of those courts in which the judge acts as judge, defence counsel and prosecutor, because the judge has less opportunity to perform the required fact-finding function in such a situation.

In his view the real importance of the adversary system is to create respect for the court. He argues that if the court is seriously interested in hearing the child's side of the story, he will not feel that the procedure is "completely stacked". By not giving the juvenile an opportunity to challenge the testimony of witnesses and to present his own case, the experience becomes, for the juvenile, "one more telling example of the hypocrisy and treachery of the adult world".

Handler raises, but does not attempt to answer, what he feels are the important questions relating to right to counsel. He asks whether the role of the lawyer representing a child in juvenile court should be different from his role in representing an adult

³⁴*Ibid.*, 19.

offender in the criminal court. He points out that, if, as it appears to be generally accepted, the role of the lawyer representing the adult offender is to have his client acquitted, or to see that if he is convicted it is on evidence properly admissible, then he is justified in raising all reasonable objections and seeing that evidence harmful to his client (of which he is aware) is not presented in court.

On the other hand, the role of the juvenile court is to act in the best interests of the child. The court cannot do this unless it is in possession of all the facts. Frequently only the child and his counsel know all the facts. The dilemma is now apparent. Should the lawyer instruct the client to testify, thereby violating the right to refrain from incriminating himself, to enable the court to convict and prescribe treatment? Or should the lawyer instruct the client to remain silent, thereby gaining an acquittal, which may not be in the best interest of the child?

Shirley D. McCune and Daniel L. Skaler

An article by Shirley D. McCune and Daniel L. Skaler³⁵ examines the qualifications of the more than three thousand juvenile court judges in the United States. The authors indicate that at the time of their research ninety-six per cent of them were male, and that, of all the judges, seventy-one per cent had law degrees, twenty-four per cent had no legal education, and five per cent had some legal education. The mean income of the judges amounted to \$12,490, and the national average of trial court judges amounted to \$17,049. This led them to conclude that juvenile court judges were underpaid, both as judges and members of the legal profession.

McCune and Skaler comment:

"The fact that Juvenile Court work is a 'minor' responsibility in most jurisdictions may be interpreted as indicating that the job can be adequately done on a part time basis. Perhaps a more realistic assessment, however, would be that although the philosophy of the Juvenile Court has achieved universal acceptance, it has been integrated into the existing judicial structure without recognition of the complexity of the job assignment."³⁶

They continue:

"Is legal education alone sufficient for adequate functioning in the role of Juvenile Court judge? . . . The importance of behavioral science to the work of the court is unquestioned. It would be unreasonable to expect that the judge, vested with ultimate decision authority in 'treatment' determinations, should not have at least enough familiarity with the field to be able to

³⁵*Juvenile Court Judges in the United States*, 11 *Crime & Delinquency* 121 (1965).

³⁶*Ibid.*, 126.

assess and understand the diagnostic and treatment recommendations of his behavioral science experts (psychologists, psychiatrists, probation officers)."³⁷

The authors were commissioned to conduct a research experiment by the National Council of Juvenile Court Judges. They point out that one of the features which differentiates a judge of the juvenile court from a judge presiding in any other court, is that the juvenile court judge is required not only to adjudicate on the guilt or innocence of the child, but also to prescribe treatment for him. McCune and Skaler say:

"To discharge this function . . . the judge, in addition to applying legal expertise, may be called upon to perform the duties of an administrator, a re-habilitation expert, a community organizer. . . . The judge . . . remains the caretaker of the system and retains ultimate decision of authority, on both the adjudication and the treatment level."³⁸

Professor Paulsen

In another article, Professor Paulsen comments upon³⁹ the qualifications for a juvenile court judge:

"Arguments for the creation of a specialized Juvenile or Family Court always bring out the point that the cases which come to these courts require a judge with special training and understanding. At the very least, the judge should be able to use expertly the social and psychological information which his staff gathers for him. Making the point real is still a dream in almost every court. By and large, special experience is lacking, politics still plays a major role in judicial selection, understanding and mutual confidence between the judges and the court staff are often absent. In many courts the judges are not specialists at all . . .".⁴⁰

*In re Gault v. U.S.*⁴¹

The reasons for judgment of the Supreme Court of the United States were delivered in the case of *In the Matter of the Application of Paul L. Gault* on May 15, 1967. This was an appeal from the Supreme Court of Arizona involving the question of whether the constitutional guarantee of due process of law was applicable to juvenile court proceedings.

On June 8, 1964, Gerald Gault, the son of Paul L. Gault, and another boy were taken into custody. At the time Gerald was subject to a six months' probation order. He was taken into

³⁷*Ibid.*, 129.

³⁸*Ibid.*, 122-23.

³⁹*Juvenile Courts, Family Courts and the Poor Man*, 54 Calif. L. Rev., 696 (1966).

⁴⁰*Ibid.*, 701.

⁴¹87 Sup. Ct. 1428 (1967).

custody as the result of a verbal complaint by a neighbour about a telephone call made to her in which the caller or callers made lewd or indecent remarks. Gerald was picked up without notice being given to his parents, who were at that time at work. He was taken to a detention home. Later the same evening his parents, who had learned he was there, were verbally advised that a hearing would be held in the juvenile court at three o'clock in the afternoon of the following day, June 9. A probation officer, Flagg, filed a petition with the court on June 9, but it was not served on the parents. The petition recited that the minor was under the age of eighteen and was in need of the protection of the court, and that he was a delinquent minor.

The hearing was held on June 9. Gerald was there together with his mother and older brother, and probation officers Flagg and Henderson. The complainant was not there and no one was sworn to give evidence at the hearing. No transcript or recording of the proceedings was made. The judge questioned Gerald with regard to the telephone call and there was conflict as to what was said. At the conclusion of the hearing, the judge said that he would think about it. Gerald was taken back to the detention home. On June 11 or 12 he was released to his parents. No explanation was given as to why he was kept in custody, nor as to why he was released. On the day of Gerald's release, officer Flagg sent a note to Mrs. Gault on plain paper which advised her that the judge had set June 15 as the date for further hearings with regard to Gerald's delinquency.

On June 15 Gerald was present with his parents and again the complainant was not there. Mrs. Gault asked that the complainant be present so that she might identify which of the two boys spoke on the telephone to her, the issue then being which of the two boys spoke on the telephone. The judge said that she did not have to be present. At this hearing a "referral report" made by the probation officers was filed with the court, but not disclosed to Gerald or his parents.

At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority, unless sooner discharged by process of law". At this time Gerald was fifteen years old.

In Arizona no appeal is permitted in juvenile cases and, accordingly, on August 3, 1964, a petition for a writ of *habeas corpus* was filed. The application was dismissed and the appellant sought review in the appeal court. This court affirmed the dismissal of the writ.

The Supreme Court was asked to hold that the Juvenile Code of Arizona was invalid on its face, or as applied in the case before

it, because, contrary to the Due Process Clause of the Fourteenth Amendment, the juvenile was taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the juvenile court had virtually unlimited discretion, and in which the following basic rights were denied: (1) Notice of the charges, (2) Right to counsel, (3) Right to confrontation and cross-examination, (4) Privilege against self-incrimination, (5) Right to a transcript of the proceedings, and (6) Right to appellate review.

The opinion of the court was delivered by Mr. Justice Fortas. Mr. Justice Black, Mr. Justice White and Mr. Justice Harlan (dissenting in part) concurred. Mr. Justice Stewart dissented.

Mr. Justice Fortas, at great length, reviewed the history of the juvenile court system. He pointed out that:

" . . . from the inception of the juvenile court system wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. . . . It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles."⁴²

After tracing the history of the juvenile courts and the philosophy which underlies them, Mr. Justice Fortas said:

"These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the State was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the State to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subject to arrest, trial, and in theory to punishment like adult offenders. In these old days, the State was not deemed to have authority to accord them fewer procedural rights than adults.

The right of the State, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody'. He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if a child is 'delinquent'—the

⁴²*Ibid.*, 1436-37.

state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the State when it seeks to deprive a person of his liberty."⁴³

He then referred to a statement made in 1937 by Dean Pound: "The powers of the Star Chamber were a trifle in comparison to our juvenile courts. . . ."⁴⁴

Mr. Justice Fortas indicated that in the view of the court the rules of procedure in the conduct of the case are most important. He was of the view that the term "due process" is synonymous with a proper adherence to procedural safeguards. He stated that the features of the juvenile system would not be impaired if constitutional safeguards were met. For example, he said that the procedural issues under discussion in no way affected the processing and treatment of juveniles separately from adults, nor would these issues in any way change the system which refers to a juvenile as a delinquent rather than as a criminal.

With regard to the formality or informality of proceedings, Mr. Justice Fortas stated:

"Further, it is urged that the juvenile benefits from informal proceedings in the court. The conception of the juvenile court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help 'to save him from a downward career'. Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study, the sociologists Wheeler and Cottrell observe that when the procedural laxness of the *parens patriae* attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: 'Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.' Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanour and conduct, of the emotional and psychological attitude of the juveniles with whom

⁴³*Ibid.*, 1437-38.

⁴⁴*Ibid.*, 1439.

they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. . . .⁴⁵

Mr. Justice Fortas continued:

"In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'. Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of juvenile court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? . . . The essential difference between Gerald's case and a normal criminal case is that the safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment were possible because Gerald was 15 years of age instead of over 18."⁴⁶

Mr. Justice Fortas pointed out that if Gerald had been over eighteen he would not have been subject to juvenile court proceedings. In the adult court the maximum punishment would have been a fine of from five to fifty dollars, or imprisonment for not more than two months. Gerald was committed to an institution for a maximum of six years—that is, six years in custody. The Justice emphasized that had he been an adult, the constitution would have guaranteed Gerald certain rights and protections with respect to arrest, search and seizure, pre-trial interrogation, a right to counsel, and other rights. He continued:

" . . . So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and

⁴⁵*Ibid.*, 1442-43.

⁴⁶*Ibid.*, 1444.

reasons more persuasive than cliché can provide. As Wheeler and Cottrell have put it, 'The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines'."⁴⁷

Further:

"In *Kent v. United States* we stated that the Juvenile Court Judge's exercise of the power of the State as *parens patriae* was not unlimited. We said that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness". With respect to the waiver by the juvenile court to the adult of jurisdiction over an offence committed by a youth, we said that 'there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons'. We announced with respect to such waiver proceedings that while 'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in connection with the juvenile court adjudication of 'delinquency', as a requirement which is part of the Due Process Clause of the Fourteenth Amendment. . . ."⁴⁸

The court held that Gault and his parents were given inadequate notice, not only of the charge or case which they had to meet, but also of the hearing itself. The court said:

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' . . . Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. . . ."⁴⁹

It was also alleged by the appellants that the juvenile court proceedings were defective as the court did not advise Gerald or his parents of their right to counsel, and proceeded with the hearing, the adjudication of delinquency and the order of commitment in the absence of counsel for the child and his parents, or an express waiver of the right thereto. The court below said that a provision of the Juvenile Code of the State of Arizona requiring "that the probation officer shall look after the interests

⁴⁷*Ibid.*, 1445.

⁴⁸*Ibid.*, 1445.

⁴⁹*Ibid.*, 1446-47.

of neglected, delinquent and dependent children", included representation of their interests in the court. The Supreme Court rejected this contention on the grounds that the probation officers in Arizona were also arresting officers who testify against the child. Thus the probation officer could not act as counsel for the child. Mr. Justice Fortas went on to say:

"... Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. [*Gideon v. Wainwright*, 372 U.S. 335] A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defence and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him'. Just as in *Kent v. United States*, . . . we indicated . . . that the assistance of counsel is essential for purposes of waiver proceedings, so we now hold that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.

During the last decade, court decisions, experts, and legislatures have demonstrated increasing recognition of this view. In at least one-third of the States, statutes now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions."⁵⁰

The appellants also argued that the juvenile court proceedings were fatal because Gerald was not given the right to confront and cross-examine the complainant, and also because the privilege against self-incrimination with regard to Gerald's testimony was not observed. In making its finding of delinquency, the court below had relied heavily upon Gerald's "admission" of the alleged offence.

In the hearing before the judge, he was questioned by the judge and admitted making "some of the lewd statements . . . [but not] any of the more serious lewd statements". The issue was whether Gerald and/or his parents should have been advised that Gerald did not have to testify or to make a statement; an incriminating statement might result in his commitment as a delinquent. The Arizona Supreme Court rejected Gerald's contention that he had a right to be advised that he need not

⁵⁰*Ibid.*, 1448-49.

incriminate himself. The Supreme Court of the United States stated the question to be whether, in a delinquency proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with the juvenile's knowledge that he was not obliged to speak and would not be penalized for remaining silent.

In the case of *Haley v. Ohio*,⁵¹ the Supreme Court of the United States held that the admission in evidence of confessions and admissions of juveniles requires special caution. Certain ground rules were laid down in that case. Essentially, the court held that a juvenile cannot be judged by the more exacting standards of maturity that apply in the case of an adult; it is important in the case of a juvenile that, before the authorities illicit a statement from him, an adult be present. The court was of the view that the privilege against self-incrimination, contained in the Fifth Amendment, was equally available to children as well as to adults.

The court approved the well-known statement from Wigmore that "distrust of confessions made in certain situations" was perhaps more imperative in the case of children, from an early age through adolescence, than in the case of adults. The court referred to the recent Family Court Act in the State of New York which provides that the juvenile and his parents must be advised at the start of the hearing of his right to remain silent. It stated that the New York Act provides that the police must attempt to communicate with the juvenile's parents before questioning him, and pointed out that the New York Act also provides that a confession may not be obtained from a child prior to the notification of his parents or relatives, and the release of the child either to them or to the family court.

In the *Gault* case the court considered the body of law which states that because juvenile proceedings are considered to be "civil" rather than "criminal", the privilege against self-incrimination contained in the Fifth Amendment should not apply. However, the court felt that it would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. The court was of the view that all juvenile proceedings to determine delinquency which may lead to committal to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the "feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings". The court was of the opinion that committal to

⁵¹332 U.S. 596 (1948).

an institution is a deprivation of liberty. "It is incarceration against one's will, whether it is called 'criminal' or 'civil'."

A further consideration was raised—the fact that when a juvenile is arrested and charged with a serious offence there is no guarantee that the matter will definitely be tried in the juvenile courts. Because of the statutory provisions available in most States to try serious offences committed by juveniles above a certain age in the adult courts, another argument is made that the rules concerning self-incrimination which apply to adults should also apply to juveniles.

The court below was of the view that the juvenile and his parents should not be advised of his right to silence because confession was good for the child as the commencement of the assumed therapy of the juvenile court process, and that confession should in fact be encouraged. Concerning this position Mr. Justice Fortas said:

"In fact, evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment', as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. In light of the observations of Wheeler and Cottrell, and others, it seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished."⁵²

The opinion of the court concluded:

"We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege. If counsel is not present for some permissible reason when an admission is obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright or despair."⁵³

The confessions obtained from Gerald were held inadmissible. There was really no other legal evidence before the court upon

⁵²87 Sup. Ct. 1428, 1456 (1967).

⁵³*Ibid.*, 1458.

which it could base a conviction. The complainant did not attend. In this regard the court held that in juvenile court "confrontation and sworn testimony by witnesses available for cross-examination were essential".

The court accordingly stated:

"... We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements."⁵⁴

The President's Commission on Law Enforcement and Administration of Justice

The report of the President's Commission on Law Enforcement and Administration of Justice in the United States deals with issues concerning juvenile courts. The Commission, headed by Nicholas de B. Katzenbach, issued its report entitled *The Challenge of Crime in a Free Society* in February of 1967.

The conclusion of the Commission, based upon its studies and those of others, is that the juvenile court system has failed to achieve its original goals. One of the prime reasons for this failure, in the view of the Commission, is the fact that the community has been unwilling to provide adequate resources to enable the courts to be properly staffed. Also, the juvenile court judges are not of sufficiently high caliber. Another reason for the juvenile court system's failure is that the underlying theory, at the time the juvenile courts were created, is no longer valid.

Concerning the last reason the report states:

"The Commission does not conclude from its study of the juvenile court that the time has come to jettison the experiment and remand the disposition of children charged with crime to the criminal courts of the country. As trying as are the problems of the juvenile courts, the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver; and the ideal of separate treatment of children is still worth pursuing. What is required is rather a revised philosophy of the juvenile court, based on recognition that in the past our reach exceeded our grasp. The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality.

⁵⁴*Ibid.*, 1459.

The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitation of offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with threatening conduct is nevertheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it."⁵⁵

The report points out that the formalities of criminal procedure have always been rejected in the juvenile courts on the ground that they were not needed in such proceedings, as such formalities would be destructive of the goals of the proceedings. Informality in both procedure and disposition thus became a basic characteristic of juvenile courts. However, "there is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers."⁵⁶

The Commission therefore recommended the following procedural rules for a juvenile court:

- (1) Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent.
- (2) Juvenile court hearings should be divided into an adjudicatory hearing and a dispositional one. The evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumour, and other unreliable types of information.
- (3) Notice should be given in advance of any scheduled court proceeding, including in-take, detention, and waiver hearings, and should set forth the alleged misconduct with particularity.

With regard to the second recommendation the Commission stated:

"Perhaps the height of the juvenile court's procedural informality is its failure to differentiate clearly between the adjudication hearing, whose purpose is to determine the truth of the allegations in the petition, and the disposition hearing, at which the

⁵⁵N. de B. Katzenbach *et al.*, *The Challenge of Crime in a Free Society* (1967), 81.

⁵⁶*Ibid.*, 85.

juvenile's background is considered in connection with deciding what to do with him. In many juvenile courts the two questions are dealt with in the same proceeding or are separated only in the minority of cases in which the petition's allegations are at issue. Even where adjudication and disposition are dealt with separately, the social reports, containing material about background and character that might make objective examination of the facts of the case difficult, are often given to the judge before adjudication. Practices vary on disclosure of social study information to the juvenile and his parents and lawyer, if he has one.

Bifurcating juvenile court hearings would go far toward eliminating the danger that information relevant only to disposition will color factual questions of involvement and jurisdictional basis for action."⁵⁷

In summary, therefore, the Commission concluded:

"Further, the system should operate with all the procedural formality necessary to safeguard adequately the rights that any person has when he is subject to the application of coercive power. Juveniles should be represented by counsel; they should be able to confront those complaining of their conduct; their fate should not be determined by hearsay or gossip. They should not be unnecessarily detained."⁵⁸

Aaron D. Samuels: New York State Family Court Law and Practice

The State of New York recently passed a new Family Court Act which has established certain procedural rules with regard to trials in the juvenile court. This subject, together with the practice in the family court, is dealt with by Aaron D. Samuels in a very comprehensive and useful book entitled *New York Family Court Law and Practice*, which was published in 1964.

The Act has created a new functionary known as the "Law Guardian". The law guardian is an attorney who is designated to represent minors in certain proceedings, including juvenile delinquency proceedings, to which the Act applies. The functions and purposes of the law guardians are

"... to assist the court, to insure against any invasion of civil rights or violations of constitutional privileges, and supply the Legislature and Governor with an independent view of the practical effect of the new Act. Through day to day contacts with other members of the Bar, law guardians will also serve a "seeding" function. They will be in a position to inform colleagues of the practices and needs of the court."⁵⁹

⁵⁷*Ibid.*, 87.

⁵⁸*Ibid.*, 88.

⁵⁹A. D. Samuels, *New York Family Court Law and Practice* (1964), 30-1.

Upon either the request of a parent or a legally responsible person, or of the child to whom independent legal representation is unavailable, or on its own motion, the court must appoint one of its law guardians to represent a minor in juvenile delinquency proceedings.

The Act has established two categories of proceedings: the first is the "fact-finding" hearing, sometimes called the "adjudicatory" hearing; the second is known as the dispositional hearing.

A fact-finding hearing is held first. It is at this hearing that the court determines whether the allegations in the petition are sustained by a preponderance of evidence. At the beginning of this hearing the respondent child, and his parent or other legal custodian, must be advised of his right to remain silent and of his right to be represented either by counsel chosen by him or his parent or custodian, or by a law guardian appointed by the court. The Act further provides that the general public may be excluded from any hearing, with only those having a direct interest in the case being admitted. If the child is in custody, the fact-finding hearing must take place not more than three days after the filing of a petition.

After the fact-finding hearing has been concluded, the dispositional hearing may commence, assuming a finding of "guilt" has been made. The dispositional hearing is "a hearing to determine whether the respondent requires supervision, treatment or confinement". Unlike the fact-finding hearing, in which the court's concern is to determine whether allegations as to the respondent's actions have been proven, its concern here is for the needs of the respondent. The proceedings are somewhat analogous to those in a criminal court in which the accused, who has been tried as to the allegations in the indictment or information, appears for judgment and sentence on the basis of the finding of his guilt. In the dispositional hearing before the judge, there is before him "the formal finding which has been made after the fact-finding hearing, the reports of the probation service, the whole file developed from the initial in-take stage, and such testimony or evidence which may be produced, whether or not competent but necessarily material and relevant. Upon all this, the court makes final disposition."⁶⁰

On the fact-finding hearing, the judge must be satisfied "on a preponderance of the evidence". The evidence that he receives, according to the Act, must be competent, material and relevant.

"Despite the expected and tolerated informality of a court which seeks to avoid the excessive stiffness and legalism of trials in criminal courts, it must none the less appear, by evidence presented in the usual manner and under the rules of evidence, that

⁶⁰*Ibid.*, 304-05.

the child has committed the act alleged. At this point, the court cannot have before it investigation reports, which may be, and usually are, hearsay, or statements made in in-take procedures, nor may it base its determination on an uncorroborated confession made out of court."⁶¹

The procedures applicable to the dispositional hearing pursuant to the Act are, however, quite different. At this point the facts have already been determined and the question becomes a social rather than a juridical one. At this stage the Act permits the judge to consult the whole file. He may hear witnesses, make investigations and consult records. While such evidence as he admits must still be relevant and material, the requirement of competency no longer holds.

SUGGESTIONS FOR CONSIDERATION

The following subjects are put forward for consideration when formulating procedural rules for the guidance of the conduct of hearings in juvenile courts:

- (1) The charge or allegation against the juvenile should be clearly set out in writing so that the case that must be met will be known with particularity.
- (2) Where possible, the parents or guardian of the juvenile should be informed of the charge or allegation against the juvenile, and when and where all hearings connected with the case are to take place.
- (3) There should be two distinct hearings: first, a fact-finding hearing to determine on a preponderance of evidence, whether or not the juvenile has committed the act alleged; and second, where a finding adverse to the juvenile is made, a dispositional hearing should be held.
- (4) At the commencement of the fact-finding hearing, the juvenile and his parents or guardians should be advised by the judge that the juvenile has the right to be represented by counsel of his own choice, or counsel appointed by the court, and a reasonable adjournment should be granted where necessary to permit counsel to be obtained, or to be appointed, and to become familiar with the case.
- (5) Before proceeding with the fact-finding hearing, the judge should inform the juvenile, in language and terms suitable to the age and understanding of the child, of the nature of the charge and the powers of the court to dispose of the charge.
- (6) Whether or not he does so before proceeding with the fact-finding hearing, the judge should also advise the juvenile and his parents or guardian of the right of the juvenile to remain silent and have the allegation against him proved on a preponderance of legally admissible evidence.
- (7) The rules of evidence which should apply to the fact-finding hearing ought to be established. All witnesses essential to the

⁶¹*Ibid.*, 306.

proof or defence of the charge, with the exception of children of tender years, should testify under oath and be available for cross-examination. The accused should be permitted to confront his accuser.

(8) It ought to be made definite whether the judge presiding at the fact-finding hearing should or should not have available to him any written reports relating to the juvenile or the alleged offence, prepared by the police, the probation staff, or by any other source.

(9) It ought to be decided whether all cases, where possible, should be conducted by special prosecutors assigned to the juvenile courts, who are under the general supervision of the Crown Attorney.

(10) If it appears to the judge, after hearing the evidence in support of the case for the prosecution, that a *prima facie* case has been made out, the juvenile, his parents or guardian, and his counsel should be advised that the juvenile may make a statement, may give evidence, or may call witnesses.

(11) The court should avoid leaving any impression in the mind of the juvenile that he has been unfairly treated. To leave such an impression might result in the juvenile's concluding that if the State has no respect for procedural rules of a fair hearing, then the laws of the State are not deserving of his respect. One of the main purposes of juvenile court proceedings is to create a respect for the law. As the formality of a hearing, however, may be relative to the age of the juvenile, less formality may be required where the court is dealing with less mature children.

(12) Provision should be made that anything said by a juvenile in juvenile court proceedings would be inadmissible in evidence against him in any subsequent proceedings.

(13) On the dispositional hearing, the judge should obtain information concerning the juvenile's general conduct, home environment, school record, medical history, and other similar matters. If necessary, this information may be in the form of a written pre-sentence report, a copy of which should also be provided for the parents or guardian of the juvenile and his counsel. The judge should not consider this information prior to the dispositional hearing.

(14) Strict adherence to the rules of evidence need not be followed in the dispositional hearing.

(15) The juvenile should be permitted to call evidence at the dispositional hearing and he should be permitted, if more convenient, to file such evidence in writing.

(16) The fact-finding hearing should be held within a short time after the charges have been laid.

(17) A written record should be made of all evidence taken at both the fact-finding and the dispositional hearings.

(18) A special court of criminal jurisdiction should be created to deal exclusively with all offenders between the ages of sixteen and twenty inclusive.

CHAPTER 41

County and District Courts

INTRODUCTION

THE county court judges (unless otherwise indicated, the terms county court and county court judge used in this chapter are intended to include district courts and district court judges) not only preside over the county courts but also the surrogate courts, and usually the division courts. In addition, they hear appeals under thirty-one statutes.¹ By virtue of his appointment the county court judge is a local judge of the Supreme Court, and with a few exceptions the county court judges are local masters of the Supreme Court in their respective counties.

The criminal jurisdiction exercised by a county court judge is an important one. As Chairman of the Court of General Sessions of the Peace he has jurisdiction to try, with a jury, all indictable offences except those few that are reserved to the exclusive jurisdiction of a superior court under section 413 (2) of the Criminal Code. With the consent of the accused, a county court judge may try, without a jury, any of the indictable offences within the jurisdiction of the Court of General Sessions of the Peace. All appeals in federal and provincial summary conviction matters come before the county court judge. The jurisdiction exercised by county court judges is considered in different aspects in this Report. In this chapter we are concerned principally with the subject as it relates to the organization of the courts generally.

¹See Appendix A to Chapter 44, pp. 672-73 *infra*.

HISTORY OF THE COUNTY COURT

The county court was first established in 1794 by An Act to Establish a Court for the Cognizance of Small Causes in Each and Every District of This Province.² At that time the southern, and more populous, part of Upper Canada was divided into four districts for the purpose of the administration of law and justice. The courts as constituted were styled district courts. It was not until 1841 that judges of these courts were required to be qualified lawyers. Their jurisdiction was limited to "actions of contract for sums above forty shillings, not exceeding the sum of fifteen pounds".³ Claims for amounts less than forty shillings were heard by the Court of Requests created in 1792 presided over by two or more justices of the peace.⁴ The Courts of Requests are the antecedents of today's division courts, which replaced them in 1841.⁵ When the districts of the southern areas of the province were abolished and the counties organized, the district courts became county courts.⁶

The present district courts, which exercise jurisdiction in northern Ontario similar to that of the county courts, date from 1853 when the Governor of the province was empowered to form provisional judicial districts out of the unorganized tracts of land bordering upon Lakes Superior and Huron in order "to provide . . . for the general well-being and protection of those who may resort thither . . . and to deter evil disposed persons from inciting the Indians and half-breeds". The Governor was also empowered to appoint a judge for each of these provisional judicial districts with the same powers and duties as county judges. All legislation relating to the composition, powers and jurisdiction of the county courts applied equally to these newly created district courts.⁷

²Statutes of Upper Canada 1794, 34 Geo. III, c. 3.

³*Ibid.*

⁴An Act for the More Easy and Speedy Recovery of Small Debts, Statutes of Upper Canada 1792, 32 Geo. III, c. 6.

⁵Statutes of Upper Canada 1841, 4 Victoria, c. 3.

⁶An Act for Abolishing the Territorial Division of Upper Canada into Districts, Statutes of Upper Canada 1849, 12 Victoria, c. 78, s. 3.

⁷An Act to Make Better Provision For the Administration of Justice in the Unorganized Tracts of Country in Upper Canada, Statutes of Upper Canada 1853, 16 Victoria, c. 176, ss. 1, 3, 5.

Since 1794 the jurisdiction of the county courts has been steadily extended, both in terms of subject matter and of monetary limits. A limited jurisdiction in torts was conferred in 1797 to hear claims in trespass, not exceeding fifteen pounds in value, but actions based on assault and battery or false imprisonment were excluded. At the same time the jurisdiction of the court was increased to forty pounds in respect of liquidated claims in contract or debt.⁸ There was no further increase in monetary jurisdiction until 1845 when the amounts in contract or debt were raised to twenty-five pounds (or fifty pounds if liquidated), and to twenty pounds in tort.⁹ These amounts were raised to fifty pounds, one hundred pounds and thirty pounds respectively in 1850.¹⁰ Certain equity jurisdiction was conferred on these courts in 1852, limited generally to fifty pounds.¹¹ In 1856 it was specifically provided that the county courts had no jurisdiction in actions involving the title to land, the validity of any devise or bequest, or for libel, slander, criminal conversation or seduction.¹² Libel and criminal conversation are still excepted from the jurisdiction of county courts.¹³

By 1877 the monetary limits were raised to \$200 for personal actions and \$400 in contract actions in which the amount was liquidated.¹⁴ In 1896 the amount for liquidated contractual claims was raised to \$600, but otherwise the upper limit remained at \$200.¹⁵ More important, however, was that the 1896 legislation gave the county courts an unlimited voluntary jurisdiction, which they retain to the present time. The parties were enabled to confer an unlimited jurisdiction upon the county court in contract actions, where the amount was liquidated, by signing an agreement in writing giving the court power to try the action.¹⁶ This power to confer un-

⁸Statutes of Upper Canada 1797, 37 Geo. III, c. 6, ss. 1, 2, 3.

⁹Statutes of Upper Canada 1845, 8 Victoria, c. 13, s. 5.

¹⁰Statutes of Upper Canada 1850, 13 & 14 Victoria, c. 52, s. 1.

¹¹Statutes of Upper Canada 1853, 16 Victoria, c. 119, s. 2.

¹²Statutes of Upper Canada 1856, 19 & 20 Victoria, c. 90, s. 20.

¹³County Courts Act, R.S.O. 1960, c. 76, s. 19(1)(b), as amended by Ont. 1961-62, c. 24, s. 5(1)(b).

¹⁴County Courts Act, R.S.O. 1877, c. 43, s. 19.

¹⁵Ont. 1896, c. 19, s. 2.

¹⁶*Ibid.*, s. 3.

limited monetary jurisdiction upon the county judge was considerably expanded by legislation passed in 1909 and 1910. By this legislation the county judge obtained the power to try any actions (within the classes allotted to the county court), regardless of amount or value, unless the defendant in his appearance or his statement of defence disputed the jurisdiction and set out the ground on which he relied. If the action proceeded before the county court judge, he could deal with the matter fully and award Supreme Court costs if the amount recovered was beyond the compulsory jurisdiction of the county court. He could also deal with set-offs or counterclaims in excess of his monetary jurisdiction.¹⁷

In 1909 the monetary limits, in general, were \$800 in contract and \$500 in other actions. In 1949 these amounts were raised to \$1200 and \$1000 respectively.¹⁸

PRESENT MONETARY JURISDICTION OF THE COUNTY COURTS

The county courts now have jurisdiction in:

- (a) Actions arising out of contract, expressed or implied, in which the sum claimed does not exceed \$3,000;
- (b) Personal actions, except actions for criminal conversation and actions for libel, wherein the sum claimed does not exceed \$3,000;
- (c) Actions for trespass or injury to land in which the sum claimed does not exceed \$3,000, unless the title to the land is in question, and in that case also where the value of the land does not exceed \$3,000 and the sum claimed does not exceed that amount;
- (d) Actions for the obstruction or interference with a right-of-way or other easement where the sum claimed does not exceed \$3,000, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount;

¹⁷Law Reform Act, Ont. 1909, c. 28, s. 21; County and District Courts Act, Ont. 1910, c. 30, ss. 21, 22, 23.

¹⁸Ont. 1949, c. 19, s. 1 (1).

- (e) Actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed \$3,000;
- (f) Actions for the enforcement by foreclosure or sale, or for the redemption of mortgages, charges or liens, with or without a claim for delivery of possession or payment or both, where the sum claimed to be due does not exceed \$3,000;
- (g) Partnership actions where the joint stock or capital of the partnership does not exceed in amount or value \$20,000;
- (h) Actions by legatees under a will for the recovery or delivery of money or property bequeathed to them where the legacy does not exceed in value or amount \$3,000, and the estate of the testator does not exceed in value \$20,000;
- (i) In all other actions for equitable relief where the subject matter involved does not exceed in value or amount \$3,000;
- (j) Actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed \$3,000.¹⁹

Where an action is commenced in the county court that would otherwise be within the jurisdiction of the Supreme Court, it may be transferred to the Supreme Court at the instance of the defendant. Otherwise the action is tried in the county court in the ordinary way, unless it is one of those actions expressly excluded from the jurisdiction of the county courts. Where the defendant pleads a set-off or counterclaim, either party may apply to a judge of the Supreme Court for an order transferring the action and counterclaim to the Supreme Court on the ground that such set-off or counterclaim involves matters beyond the jurisdiction of the county court.²⁰

If a defendant requires an action to be transferred to the Supreme Court, and the amount of money recovered is within the competence of the county court, the defendant will usually be required to pay the costs on the Supreme Court

¹⁹R.S.O. 1960, c. 76, s. 19 (1), as amended by Ont. 1961-62, c. 24, s. 5.

²⁰*Ibid.*, s. 20 (1).

scale. Conversely, if an action is commenced in the Supreme Court and the amount recovered is within the competence of the county court, the plaintiff will usually be required to pay the defendant the costs on the Supreme Court scale, with set-off against the costs on the county court scale.

SURROGATE COURT JURISDICTION EXERCISED BY COUNTY COURT JUDGES

The surrogate court is a provincial court of record presided over by a judge appointed by the Lieutenant Governor in Council. As a matter of practice the judges of the county courts are invariably appointed to be the surrogate court judges.

It is unnecessary to discuss in detail the several functions and the wide jurisdiction of the surrogate court judges. They have, with certain express exclusions,

"21. . . . all jurisdiction and authority in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the property of deceased persons, and all matters arising out of or connected with the grant or revocation of grant of probate or administration . . .".²¹

An action for a legacy or for distribution of the residue of an estate shall not be entertained in the surrogate court and hence not tried by a surrogate court judge,²² but by some legislative manipulation an action for a legacy not over \$3,000, where the estate is not over \$20,000, may be brought before the same judge in the county court.

The Supreme Court has certain concurrent jurisdiction with the surrogate court and there is provision for removing contentious matters from the surrogate court to the Supreme Court.

With the economic development of the province there has been a very marked increase in the volume of estates passing through the surrogate court. Between 1956 and 1966 the applications for probate and administration increased from 19,193 to 24,166, and applications for guardianship from 51 to

²¹R.S.O. 1960, c. 388, s. 21.

²²*Ibid.*, s. 22.

426.²³ No doubt the size and value of the estates has increased proportionately. This adds to the burden on the judges.

CRIMINAL JURISDICTION EXERCISED BY THE COUNTY COURT JUDGE

In the exercise of the criminal jurisdiction committed to him, whether acting as Chairman of the General Sessions of the Peace or presiding over the County Court Judges Criminal Court, the county court judge in practice exercises in some ways even a wider power over the liberty of the subject than is exercised by a judge of the Supreme Court. The Supreme Court judge has no jurisdiction in Ontario to try criminal cases without a jury, except offences under the Combines Investigation Act.²⁴ In cases of murder and treason the sentences are fixed by law, and in other cases that usually come before a Supreme Court judge the sentencing problems are not as complex as those that come before the county court judges.

Of 15,509 indictable offences tried in Ontario in the year 1965, 121 were tried by Supreme Court judges, 699 by county court judges, and the remainder by magistrates. In other words, 95% of those charged with indictable offences were tried by magistrates, 4.3% by county court judges, and .7% by Supreme Court judges. No doubt a large proportion of those cases tried by magistrates involved pleas of guilty, while the converse would be true where the trials took place before county court judges and Supreme Court judges.

RE-ORGANIZATION OF THE JURISDICTION OF THE COUNTY AND DISTRICT COURTS

The distribution of the work load between the county court and Supreme Court in civil matters is in sharp contrast with the distribution of the work load in criminal matters. In this distribution, property values far outweigh human values. The philosophy of the pioneer days, when human values were of little concern in the administration of justice, still prevails.

²³Annual Reports of the Inspector of Legal Offices for the Province of Ontario, (1956), (1966).

²⁴Can. 1960, c. 45, s. 17.

The damage awards made in the Supreme Court of Ontario are analyzed in the following table:

**Supreme Court Damage Awards
Toronto, 1966**

Amount of Damages	Number of Awards			
	Weekly Ct.	Jury	Non-Jury	
\$1 - 999	148	65	53	
\$1,000 - 1,999	100	47	31	
\$2,000 - 2,999	72	22	19	
\$3,000 - 3,999	47	19	17	
\$4,000 - 4,999	47	17	19	
\$5,000 - 5,999	33	12	20	
\$6,000 - 6,999	20	9	16	
\$7,000 - 7,999	12	10	12	
\$8,000 - 8,999	22	4	15	
\$9,000 - 9,999	13	7	7	
\$10,000 - 19,999	47	21	45	
\$20,000 - 49,999	33	15	31	
\$50,000 -	16	2	14	
Total No. of Awards	610	250	299	1159
No. of Awards under \$10,000	514	212	209	935

In this analysis we are dealing with awards of damages only. The actions would largely arise because of injuries sustained through the operations of motor vehicles. This would be particularly true of the awards made in weekly court, which would be as a result of settlements. The figures set out in the foregoing table are awards for individual plaintiffs. No doubt in many cases two or more plaintiffs had been joined together to bring the collective award within the jurisdiction of the Supreme Court, although the amounts awarded to the individual plaintiffs would be well within the jurisdiction of the county court. In any event, the amount of the award has always been a measure adopted in determining civil jurisdiction as it is usually a fair measure of the importance of the case. Of the 549 awards of damages made at trial, 237 were within the jurisdiction of the county court—over 43%. Of the

250 awards made at jury trials, 134 were within the jurisdiction of the county court—53.5%. These figures clearly demonstrate that a large part of the time of Supreme Court judges is taken up with the trial of civil cases that could well be tried by county court judges. At present the county court judges are trying serious criminal cases that ought to be tried by Supreme Court judges.

The first step that should be taken in the jurisdictional reorganization of the courts is to increase the involuntary jurisdiction of the county court to cases in which the amount involved is under \$10,000 in personal injury cases. As long ago as January, 1961, Mr. J. J. Robinette, Q.C., then treasurer of the Law Society of Upper Canada, made this statement on the occasion of the opening of the High Court of Justice for Ontario for that year:

“The work of Your Lordships’ court during the past year has been extraordinarily heavy, and it is almost miraculous that Your Lordships have been able to keep abreast of the growing volume of litigation in the Supreme Court of Ontario. That growing volume comes not only from the normal increase in an expanding community in normal fields of litigation, such as automobile accident cases, contract cases and the like, but it also comes from entirely new heads of jurisdiction which have developed during the past ten or fifteen years. There has, of course, been a tremendous development in important commercial litigation, which has to be expected as concurrent with the economic development of your country; but also the court has had to deal with a number of important cases relating to the judicial review of the functions of administrative tribunals, problems of labour law, and an ever increasing number of cases involving land-use control and other legal problems arising out of activities of our vigorous municipalities.

For all these reasons the work of the court has been very heavy and will likely be heavier during 1961. There may be need for some additional judges in the High Court of Justice, but, with the greatest respect, I suggest that it is not desirable that the court indefinitely be expanded, and I suggest for the consideration of the proper authorities that more of what is, I think, today the unnecessary burden of this court could be removed if the monetary jurisdiction of the county court judges in automobile accident cases at least were increased, and I can see no reason, with respect, why that should not be

increased to cases involving claims up to \$10,000. If this were done it would leave the members of this court more judicial time available for more important fields where the policy of the law needs elucidation, and it is at a crucial stage of development."

If the recommendations of this Report are adopted there will be a much wider development in the work load of the Supreme Court and the judges appointed to that court with respect to matters referred to by Mr. Robinette. If the jurisdiction of the county courts is increased as we suggest, the work load of those courts will be increased by about 185 trials per year. This increase amounts to slightly more than two trials per year per county court judge in the province. No doubt the increase would fall more heavily in the more densely populated areas. The Chief Judge of the County and District Courts has wide powers to make such readjustment or reassignment of the time and other requirements of the various courts as may be deemed necessary from time to time.²⁵

However, the reorganization of jurisdiction should not stop there. The criminal work of the courts should be so reorganized that the major portion of the serious criminal cases will be tried in the Supreme Court. This is done in England and it should be done here. One additional Supreme Court judge should be made available to preside in a continuous criminal court in Toronto and in other large centres when required. It is a false sense of values and a waste of judicial talent that dictates that a Supreme Court judge should sit daily in Toronto to hear uncontested divorce cases, while county court judges are presiding over matters of widest consequence to the future lives and properties of individuals.

The reorganization of the duties of the county court judges should go still further. What we have said with respect to the relationship between the jurisdiction exercised by the Supreme Court and that exercised by the county court applies with equal force in some respects in the relation that the county courts bear to the division courts. If the recommendations we make in Chapter 42 are adopted, the county court judges in larger centres will be relieved of a substantial part

²⁵County Judges Act, R.S.O. 1960, c. 77, s. 16, as re-enacted by Ont. 1961-62, c. 25, s. 9.

of their duties as division court judges. In addition, if the recommendations we make in Chapter 69—that a Lands Tribunal be established, and that the practice of appointing county court judges to commissions and to conduct labour arbitrations and to preside over conciliation boards be discontinued—the county court judges will be free to direct their full time to judicial duties.

In determining what the jurisdiction of the respective courts should be, there is only one interest to be considered and that is the public interest. In providing for a means of settlement of disputes in the courts, two things are paramount—the cost to the litigant and prompt disposition of the cases. When one examines the Supreme Court Damage Awards table²⁶ it becomes apparent that the cost bears too heavily on the litigant under the present distribution of jurisdiction. It is conservative to say that the law costs borne by each party in a law suit in the Supreme Court will be more than \$1,000. If this is true, in many of the cases the costs involved equal and sometimes exceed the total amount of the judgment. The costs of a trial in the county court are approximately one-half of the costs of a trial in the Supreme Court. If the jurisdiction of the county court is increased, there may have to be some proportionate increase in the tariff of costs in the county court, but the net result should make for substantial savings for the litigants.

If the Supreme Court assumes the task of trying a greater volume of criminal cases, additional provision will have to be made to expedite trials in centres outside of metropolitan areas. An appropriate distribution of criminal cases between the General Sessions of the Peace and the Supreme Court should work towards the expedition of trials. Where the sittings of the General Sessions of the Peace are six months apart, the sittings of the Supreme Court could be arranged so that no longer period than three months would elapse between the sittings for the trial of criminal cases. In other areas where the sittings of the General Sessions of the Peace are quarterly, the courts could be so arranged that there would

²⁶See p. 612 *supra*.

always be a court available to try an accused person within a short period of time.

Under the General Sessions Act the Chief Judge of the County and District Courts may require additional sittings of the court in the county, and at such time as he specifies.²⁷ To call a special sitting of a jury court adds to the expense of trials and is an inconvenience to jurors. It is much better to have the courts fixed for specific times, as often as possible. Nevertheless, the power to require a special sitting is a good one, though rarely exercised.

In addition to the arrangement of the sittings of the courts, there should be a reorganization of their territorial jurisdiction. If the province assumes the entire cost of administering justice, it will be possible to make convenient arrangements for the prompt trial of criminal cases, following to some extent the English procedure. In England the Magistrates' Court Act provides:

"10. (1) The magistrates' court before which any person is charged with an offence may, instead of committing him to be tried at the [local] assizes or quarter sessions . . . commit him to be tried at the assizes for some other place or, if the offence is triable by quarter sessions, at the quarter sessions for some other place, if it appears to the court, having regard to the time when and the place where the last-mentioned assizes or quarter sessions are to be held, to be more convenient to commit the accused to those assizes or quarter sessions with a view either to expediting his trial or saving expense:

Provided that the power given in this section shall not be exercised—

(a) unless at the time of the committal it appears to the court unlikely that . . . the next [local] assizes or . . . the next [local] quarter sessions . . . will be held within one month from that date; or,

(b) in any case in which the accused satisfies the court that he would, if the power were exercised, suffer hardship."²⁸

Under the Criminal Justice Administration Act, 1962, it is mandatory to commit an accused for trial at an assize or quarter sessions in another place, when it appears that he can-

²⁷R.S.O. 1960, c. 163, s. 4a, as enacted by Ont. 1965, c. 44, s. 2.

²⁸1952, 15 & 16 Geo. VI and 1 Eliz. II, c. 55, s. 10 (1).

not be tried locally within eight weeks of the committal, unless the court is satisfied that there are other circumstances which would make the transfer undesirable.²⁹

Under the Criminal Code and existing provincial legislation, provision is made for changing a place of trial from one county or provisional district to another, or between counties and provisional districts. Such a change of venue depends upon its being shown that a fair trial cannot be had in the original jurisdiction, or in the unlikely event that a jury cannot be summoned there.³⁰ Where a change of venue is ordered, the problems of properly allocating the financial responsibility of the municipalities involved, and those of the province, are most difficult.³¹

If the province assumes full financial responsibility for the administration of justice (recommended in Chapter 60), municipal boundary lines will be largely irrelevant. The province could by legislation provide for the free transfer of trials from one county or district to another to avoid delay, especially where the accused is in custody.

A co-ordination of the work of the Courts of General Sessions of the Peace with a minimum of delay between sittings could be facilitated by grouping adjacent counties or districts together, with the sittings for each set for different dates so that the several sittings of the General Sessions of the Peace would be held on different dates rather than all on the same date. For example, these sittings in most of the counties are held twice a year, commencing on the first Monday in June and December.³² In the case of such adjoining counties as Norfolk, Elgin, Brant and Haldimand, under the present law a change of venue from one of these counties to another would serve no useful purpose in expediting the trial of the accused. The sittings are all held on the same date. The re-organization of the county courts into divisions of counties or

²⁹1962, 10 & 11 Eliz. II, c. 15, s. 15 (2).

³⁰Crim. Code, s. 508; Judicature Act, R.S.O. 1960, c. 197, s. 60; Administration of Justice Expenses Act, R.S.O. 1960, c. 5, s. 20. See also *R. v. Adams*, [1946] O. R. 506.

³¹Administration of Justice Expenses Act, R.S.O. 1960, c. 5, s. 20. These allocation difficulties are discussed fully in Part II, Section 5, pp. 866ff. *infra*.

³²General Sessions Act, R.S.O. 1960, c. 163, s. 3.

districts, and the co-ordination of their sittings with the assizes, are essential to a more expeditious trial of cases.

In Ontario, interminable delay in the administration of justice is tolerated with casual indifference. It is just as true today as when it was first said: "Justice delayed is often justice denied." We were told in England that it is the practice to have criminal trials commenced within at least two months of the committal for trial. In Ontario some committals for trial drag on for months; many trials are delayed for over six months and sometimes more than a year. Defence counsel and crown counsel should have adequate time for preparation, but experience in the courts shows that the demands of preparation are not the real causes of delay. Too often delays are the product of mere indifference on the part of the bench or bar to their public responsibility for the administration of justice. Much of the delay could be prevented if there was some method by which the criminal and civil work of the courts could be properly supervised.

There is no satisfactory statistical information available to show what is being done in the courts throughout Ontario. This Commission endeavoured to get facts and figures as to the state of the criminal work in the County of York, but the records were insufficient to enable us to compile any satisfactory information.

There is no definite form of bookkeeping that shows when an accused is committed for trial; when he elects to be tried by a county court judge, if such is the case, or when a bill of indictment is preferred; when he is arraigned; the plea; when he is tried, and the verdict. No doubt these facts are all recorded either in books or on pieces of paper somewhere, but no effort is made to compile them in an orderly form and there is nothing from which a proper monthly or yearly balance sheet can readily be prepared. Without such information, proper supervision of the county court system is impossible. Complete statistical information should not only be available and in the form of monthly reports to the Attorney General, but these reports and the basis of them should be open for public examination. The work of the courts is public business.

What we have said concerning the records of the county court applies to the Supreme Court to a lesser degree. There are some records kept by the Registrar of the Supreme Court which show the work of the court in the different counties and districts, but there is no well-developed system of making statistical information available.

RECOMMENDATIONS

1. The involuntary jurisdiction of the county court in personal injury cases should be raised to \$10,000, with the right to apply to a Supreme Court judge for an order transferring an action from the county court to the Supreme Court where it is made to appear that by reason of the complexities of the law or facts, the action is one that should be tried in the Supreme Court.
2. As far as possible, without imposing restrictions on the right of the accused to be tried at the first court of competent jurisdiction, all trials of persons charged with the more serious indictable offences should be conducted in the Supreme Court.
3. The Province of Ontario should be divided into areas consisting of groupings of contiguous counties for the purpose of setting up alternate dates for the sittings of the assizes and the General Sessions of the Peace within the respective areas.
4. Administrative arrangements should be made to alternate the jury sittings of the Supreme Court and the General Sessions of the Peace so that there would be a minimum of delay between committal for trial and the actual trial of an accused.
5. Subject to Recommendation number 2, where an accused has been committed for trial, the trial should be proceeded with at the next sittings of an assize court or the General Sessions of the Peace in the area where the trial can most conveniently be held.
6. The administration of justice, particularly in criminal cases, should be reorganized so that the trial of cases will be prompt and expeditious.

7. An efficient, uniform, province-wide system should be set up to record the work of the courts in civil and criminal cases, showing:

In criminal cases

- (a) The date of arrest, or summons;
- (b) If in custody;
- (c) If on bail;
- (d) The date of committal for trial;
- (e) The election;
- (f) Bills preferred before the Grand Jury;
- (g) True bills found;
- (h) Date of arraignment and plea;
- (i) When the case is tried and the verdict;
- (j) Sentence.

In civil cases

- (a) Jury cases entered for trial;
 - (a) Non-jury cases entered for trial;
 - (c) Jury trials held;
 - (d) Non-jury trials.
8. Monthly reports should be made to the Attorney General showing the progress of the work of all courts. The form of the report should make it imperative to set out the number of civil and criminal cases that have been awaiting trial for one, two, three, four, or five months, etc., as the case may be.
 9. The records and reports should be open for inspection by members of the press and public at all reasonable times.

CHAPTER 42

The Division Courts

INTRODUCTION

COMPARABLE to the early Court of Requests,¹ the division courts are essentially “small claims” courts designed to provide the litigant with more expeditious, more economical and less formal procedure than that of the county and district courts and The Supreme Court of Ontario. With the many procedures available to a creditor under the provisions of the Division Courts Act² to assist in the collection of an outstanding debt, and with the many procedures carried out by the officers and judges of the division courts, it is felt by some that the division courts are little more than statutory collection agencies. This may be true to a considerable extent; nevertheless, the division courts fulfill a valuable function in the judicial system.

JURISDICTION

While other factors enter into the determination of the jurisdiction of the division courts, the primary factor is the amount of the claim. In the counties the division courts have jurisdiction in any action, with the exception of those set out below, where the amount claimed does not exceed \$400,

¹Statutes of Upper Canada 1792, 32 Geo. III, c. 6.

²R.S.O. 1960, c. 110.

exclusive of interest.³ In the provisional judicial districts, the monetary jurisdiction of the court is \$800.⁴

The court has jurisdiction with regard to all claims within its monetary jurisdiction, except actions:

- (a) for the recovery of land where the right or title thereto comes into question;⁵
- (b) in which the validity of a devise, bequest or limitation under a will or settlement is disputed;⁶
- (c) for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;⁷
- (d) against a justice of the peace for anything done by him in the execution of his office, if he objects thereto;⁸
- (e) upon a judgment or order of the Supreme Court or a county court where execution may issue upon or in respect thereof;⁹
- (f) injunctions.¹⁰

CONSTITUTION OF THE COURTS AND TERRITORIAL JURISDICTION

For the purposes of the Division Courts Act, with two exceptions, each of the counties and districts in the province has been geographically divided into two or more divisions, each division having its own division court complete with staff and offices.¹¹ For example, the County of York has been divided into eleven divisions. Its division courts are entitled the First Division Court of the County of York, the Second Division Court of the County of York, and so on.

In 1960 there were 233 division courts throughout the province. Since that time the number has been reduced, as a result of amalgamations, to 219 in operation in 1966. While

³Division Courts Act, R.S.O. 1960, c. 110, s. 54 (a), as re-enacted by Ont. 1965, c. 32, s. 2 (1).

⁴*Ibid.*, s. 214, as re-enacted by Ont. 1961-62, c. 35, s. 8.

⁵*Ibid.*, s. 53 (a).

⁶*Ibid.*, s. 53 (b).

⁷*Ibid.*, s. 53 (c).

⁸*Ibid.*, s. 53 (d).

⁹*Ibid.*, s. 53 (e).

¹⁰*Ibid.*, s. 57 (2).

¹¹R.R.O. 1960, Reg. 115. The exceptions are Haliburton and Prince Edward, each of which has only one division court.

some of these courts have a great volume of claims, a significant number of them processed fewer than 100 claims in 1966.¹²

Certain guidelines are set out in the Act to enable a litigant to determine which division court has jurisdiction concerning the subject matter of the action.¹³ For example, proceedings *must* be entered and tried:

- (a) In the court for the division in which the cause of action arose; or,
- (b) In the court for the division in which the defendant or any one of several defendants resides or carries on business; or,
- (c) In the court whose place of sitting is nearest to the residence of the defendant, or one of several defendants.

However, proceedings may be brought in other than the defined divisions in certain circumstances:

- (a) With leave of the judge, an action may be entered and tried in the court of any division in his county adjacent to the division in which the defendant or one of the defendants resides;¹⁴
- (b) An action of a woodsman for wages may be entered and tried in the court for the division in which his contract for hire was made;¹⁵ and
- (c) Where money made payable at a certain place by a contract exceeds \$100, an action may be brought in the court of the division in which the place of payment is situate, subject to the action's being transferred upon the application of the defendant to the court of any division in which, but for this provision, it might have been brought.¹⁶

The boundaries of the 219 division courts of the province in many cases involve minute detailed descriptions, which

¹²See Appendix A and Appendix B to this chapter at pp. 647-48 *infra*, compiled from information contained in the Annual Report of the Inspector of Legal Offices, Province of Ontario (1966), 48-56.

¹³R.S.O. 1960, c. 110, s. 64(1).

¹⁴*Ibid.*, s. 65.

¹⁵*Ibid.*, s. 64 (2).

¹⁶*Ibid.*, s. 69.

read like the description in a title deed. The boundaries of the jurisdiction of the Fourth Division Court of the County of Wentworth afford an example that is not unusual:

“Those parts of the County of Wentworth described as follows:

- i. The Township of Beverly.
- ii. That part of the Township of Ancaster described as follows: Commencing at the most westerly angle of the Township; thence easterly along the northerly boundary of the Township to the production northerly of the westerly limit of Lot 37; thence southerly along the production and the westerly boundary of Lot 37 across concessions 1 to 7, both inclusive, and its production southerly to the southerly boundary of the Township; thence westerly along that boundary to the westerly boundary of the Township; thence northerly along the last-mentioned boundary to the place of commencement.
- iii. Lynden P.O.”¹⁷

It is obvious that a litigant or his solicitor often must have to be a student of geography or a surveyor in order to determine which division court has jurisdiction.

The plaintiff must first determine where the cause of action arose, or where the defendant resides and then discover in which division such place is found by consulting Regulation 115¹⁸ and the nineteen amendments thereto from 1960 to 1967, which describe the geographical boundaries of all the division courts. No doubt it was this problem that the Legislature had in mind when it provided that where an action should have been entered in some other court of the same or some other county, it should not fail for want of jurisdiction, but the judge might order that all of the papers and the proceedings in the action be transferred to a court properly having jurisdiction.¹⁹ This is little consolation to the unfortunate plaintiff who finds himself in the wrong division and has his case transferred to the court of another division, where the court may not sit until a date six months hence.

¹⁷R.R.O. 1960, Reg. 115, Schedule 222.

¹⁸R.R.O. 1960.

¹⁹R.S.O. 1960, c. 110, s. 70(1).

JUDICIAL OFFICERS

Each division court is presided over by a judge of the county or district court or by a division court judge.²⁰ In densely populated counties, such as Wentworth, York, Essex and Carleton, at least one county court judge is assigned to the division courts, with the result that the number of judges available for county court duties is depleted. Even though the province has had the legislative authority to appoint division court judges since 1962,²¹ only one has been appointed. The judge appointed has presided almost exclusively in York County.

The Act also provides that the county court judge may appoint a barrister to serve as his deputy and "the barrister so appointed has all the powers and privileges vested in and is subject to all the duties imposed by law upon the judge".²² This provision has been little acted on throughout Ontario, but advantage has been taken of it in two counties, Ontario and York, where the case load is very heavy. In 1966, 4,255 claims were entered in the six division courts of the County of Ontario. In the same year 40,775 claims were entered in the eleven division courts of the County of York.

According to information made available to us, during the period from September, 1966, to June, 1967, eighty-three different barristers and solicitors served as *ad hoc* division court judges in the eleven division courts in York County for a total of 163 court days. Fifteen members of three firms whose practices are primarily devoted to litigation presided on forty-three different court days, representing more than twenty-six per cent of the courts over which lawyers presided. Of these fifteen lawyers, one presided in court on thirteen days, and another on eleven days. During this period lawyers presided in the First Division Court for twenty-five days, in the Eighth Division Court for fourteen days, in the Ninth Division Court for forty-nine days, in the Eleventh Division Court for twenty-six days, in the Twelfth Division Court for thirty-seven days, and in the six remaining division courts in the County for

²⁰*Ibid.*, s. 12; s. 1 (h), as re-enacted by Ont. 1961-62, c. 35, s. 1.

²¹*Ibid.*, s. 11a, as enacted by Ont. 1961-62, c. 35, s. 2.

²²*Ibid.*, s. 13 (1).

twelve days. *Ad hoc* judges are paid by the province an allowance of \$6.00 per day, plus a further allowance for meals and mileage.

Information supplied to us by the clerks of the division courts in the county, shows that the courts held a total of approximately 620 sittings in the ten-month period under consideration. Lawyers presided over 163 of these sittings. The result was that lawyers presided in the division courts of York County for more than twenty-five per cent of their sittings in the 1966-67 court year. In the average ten-month court year the following figures are representative of the approximate number of court sittings in the division courts of the County of York:

First Division Court	165
Second Division Court	7
Third Division Court	11
Fourth Division Court	8
Fifth Division Court	5
Sixth Division Court	5
Seventh Division Court	5
Eighth Division Court	135
Ninth Division Court	140
Eleventh Division Court	60
Twelfth Division Court	80

In the Ninth Division Court lawyers presided at approximately thirty-five per cent of the sittings, and in the Eleventh and Twelfth Division Courts lawyers presided at approximately fifty per cent of the sittings. While we do not criticize individual lawyers who give their time to preside as *ad hoc* judges of division courts, we do criticize with emphasis the system. The judicial function is not one that should be performed by practising lawyers on an *ad hoc* basis. Of the eighty-three lawyers who presided in division courts, twenty-eight have been in practice between six and ten years and twelve have been in practice for five years or less. This includes one who had been in practice for less than a year. It is inconsis-

tent with the traditional principle of the independence of the judges that lawyers in active practice should be sitting as judges one day, and on the next be consulting and advising clients. Litigants who come before them must inevitably feel that justice is not “appearing to be done”.

ADMINISTRATIVE OFFICES OF THE COURTS

The court clerk and the bailiff are the chief administrative officers of each of the division courts. They are appointed by the Lieutenant Governor and hold office during pleasure.²³ In the year 1966 in the division courts of the Province:

- (a) 213 different persons acted as division court clerks; two courts had no clerks; two persons each served as clerk for two courts; one person served as clerk for three courts.
- (b) 213 different persons acted as division court bailiffs; five courts had no bailiffs; one person served as bailiff for two courts.
- (c) 77 persons served as both clerk and bailiff in their respective courts; one person was both clerk and bailiff for two courts.
- (d) Seven wife and husband combinations served as clerk and bailiff respectively in seven courts.

A plaintiff commences an action in the division court by filing his claim in writing with the clerk of the proper court. It is the duty of the clerk to receive all claims and to issue all summonses, to attach the claim to the summons, and to hand both to the bailiff for service upon the defendant.²⁴ The summons notifies the defendant that he has ten days to file a dispute in writing and that if a dispute is not filed, judgment may be given against him by default. If the defendant files a dispute, the clerk then sends a copy of it to the plaintiff or his solicitor, together with a notice of trial. A copy of the notice of trial is also sent to the defendant.

Except in the provisional judicial districts, where the judge may so order in cases involving claims exceeding \$400,

²³*Ibid.*, s. 18.

²⁴*Ibid.*, s. 20 (1).

there is no examination for discovery of the parties or of documents, as in the county and district courts and in the Supreme Court.

The bailiff serves most of the documents in division court actions and levies execution upon the goods and chattels of judgment debtors residing in his division. One of the peculiarities of the division court system is that a plaintiff is required to use the division court bailiff to serve his claim and to pay the bailiff a prescribed fee for doing so.²⁵ He cannot avail himself of a private process server or serve the claim himself, as he may do in other courts. The clerk of one of the division courts in York County explained to us that this practice was followed as it provided "a better system of control for the court". This is not the entire reason for the practice. The practice is followed because division court clerks and bailiffs are still paid on a fee basis.

REMUNERATION OF ADMINISTRATIVE OFFICERS

Regulation 117²⁶ contains the tariff of fees payable by the parties to an action to the clerk and the bailiff. All of the clerks and bailiffs in Ontario are remunerated on a fee basis with the exception of the clerk and the bailiff of the First Division Court of the County of York, who are paid an annual salary.

Litigants must pay the prescribed fees "in the first instance and before [the proceedings are] taken".²⁷ The principal fees payable are those which the plaintiff must pay on issuing his claim. These fees are on a sliding scale depending upon the amount claimed. The fees for issuing and serving process range from a minimum of \$4.00 where the claim is for \$10.00 or less, to a maximum of \$14.75 where the action is for more than \$400. Additional fees must be paid for such items as a witness summons, service of the witness summons, an execution, transfer of documents from one division court to another, issuance of a judgment summons and a show cause summons.

²⁵*Ibid.*, ss. 30, 33.

²⁶R.R.O. 1960, Reg. 117, as amended by O. Reg. 125/66.

²⁷R.S.O. 1960, c. 110, s. 32(1).

Two examples are illustrative of the fees that must be paid on issuing a claim. Where the claim is under \$10.00, the sum of \$2.00 is payable to the clerk as a filing fee, \$1.00 is payable to the clerk to cover handling and postage, and a fee of \$1.00 is paid to the bailiff to serve the claim and summons. Where the claim is between \$200 and \$400, the clerk receives \$8.00 as a filing fee and \$1.00 for handling and postage, the bailiff receives \$3.50 for service. A further 25¢ is payable to the clerk, to be paid into the "Division Court Jury Fund".²⁸

Each clerk is entitled to retain to his own use in each year:

- (a) All the gross fees and emoluments earned by him in that year, up to \$10,000; and
- (b) Sixty per cent of the excess over \$10,000, and up to \$20,000; and
- (c) Forty per cent of the excess over \$20,000.

The bailiff is entitled to retain to his own use in each year:

- (a) All the gross fees and emoluments earned by him in that year up to \$10,000;
- (b) Eighty per cent of the excess over \$10,000, and up to \$20,000;
- (c) Seventy per cent of the excess over \$20,000.

The balance of the fees and emoluments collected is paid to the Treasurer of Ontario.²⁹

In 1966, division court clerks and bailiffs paid to the Province of Ontario, by way of excess fees, \$315,192.46. Since the province contributes little to the administration of justice in the division courts, this sum of \$315,192.46 paid by the litigants in the division courts and turned over to the province was in reality a sort of indirect tax imposed on those who had matters before the division courts. In the last analysis this money was largely contributed by debtors, who are mostly people of modest means.

²⁸*Ibid.*, s. 197 (1) (c). This is discussed in detail at p. 634 *infra* under the subheading Jury Trials.

²⁹Public Officers' Fees Act, R.S.O. 1960, c. 327, s. 7, as re-enacted by Ont. 1962-63, c. 116, s. 1.

However, the surplus earned in fees is not the only burden imposed on debtors by the fee system. The fees are scaled so as to maintain a system that is economically unsound. They are scaled to maintain a plethora of clerks, bailiffs and officers.

The division court system is unique in the public service. A form of private enterprise is engrafted on and maintained through the judicial system. With the exception of the peculiar system in the First Division Court of the County of York, the division court clerks and bailiffs operate their own offices, pay their own staffs and recoup themselves out of fees levied on litigants.

The whole system is an archaic relic of those times when it was a day's trip to go twenty miles in the province and when the administration of justice provided means of conferring petty political favours.

In the year 1966, fifty-four division court clerks reported gross fees of less than \$1,000, and fifty-two clerks reported gross fees of between \$1,000 and \$2,000. In the same year 107 bailiffs reported gross fees of under \$1,000, and forty-one bailiffs reported gross fees of between \$1,000 and \$2,000.³⁰ As a result, fifty per cent of the clerks and seventy-five per cent of the bailiffs received gross fees of less than \$2,000. It is obvious that most of these offices must be held on a part-time basis. Offices in the administration of justice ought not to be operated in connection with any other employment.

Where the gross fees and emoluments earned by a clerk or bailiff are less than \$1,000 a year, the local municipality in which the court is held is required to pay to the clerk and bailiff respectively the sum of \$4.00 for attending each sitting of the court, and the local municipality is entitled to recover from any other municipality for which the court is held, a reasonable share of amounts so paid as ordered by the judge.³¹ The only other obligation that the municipality has concerning the division courts is to provide the necessary accommodation for the sittings of the court.³² This is a responsibility difficult to fulfil in many cases.

³⁰Annual Report of the Inspector of Legal Offices, Province of Ontario (1966), 48-56.

³¹R.S.O. 1960, c. 110, s. 31(1)(2).

³²*Ibid.*, s. 8.

Under the present system, each division court clerk and each division court bailiff is virtually his own master. Since they establish their own offices and hire their own staffs, the tendency is to keep the expense low and the gross revenue high. Such practice does not necessarily invite efficiency. What it often does is incite competition between division court clerks and bailiffs. Control and supervision over the clerks and bailiffs is rendered difficult. The judge is given authority to suspend a clerk or bailiff, but this is seldom if ever exercised.³³

PROCEDURE

An informal procedure is followed in the division courts. The precision of pleading required in the higher courts is not demanded of the parties in drafting the claim and the dispute. Discovery of the parties and of documents is permitted with the leave of the judge and only in actions involving more than \$400.³⁴ A litigant may appear in court in person, or by an agent where the claim does not exceed \$400. If the claim is for an amount over \$400, the agent must be a barrister or solicitor.³⁵

The Act provides:

“55. Except in actions in which a jury is demanded as hereinafter provided, the judge shall hear and determine in a summary way all questions of law and fact and may make such order or judgment as appears to him just and agreeable to equity and good conscience, which shall be final and conclusive between the parties, except as hereinafter otherwise provided.”³⁶

This provision was interpreted by Mr. Justice J. K. Mackay in this way:

“This statutory provision that the judge may make such order or judgment as appears to him just and agreeable to equity and good conscience does not, in my opinion, entitle the judge to disregard the general principles of law, but may very

³³*Ibid.*, s. 15.

³⁴*Ibid.*, s. 214(2), as re-enacted by Ont. 1961-62, c. 35, s. 8.

³⁵*Ibid.*, s. 100 and s. 214 (3), as re-enacted by Ont. 1961-62, c. 35, s. 8.

³⁶*Ibid.*, s. 55.

well be interpreted to clothe the Court with jurisdiction to disregard technical defects which would defeat the justice of the claim.”³⁷

This is consistent with the provisions of section 17 of the Act, which empower the judge, at any time, to amend any defect or error in any proceeding and to make all such amendments as are necessary for the real issue raised by the proceedings, and to secure the giving of judgment according “to the very right and justice of the case”.

No change should be made concerning the informality of proceedings in the division courts.

The Division Courts Act and the regulations made under the Act comprise a fairly complete code of practice and procedure in the division courts. Most of the rules are designed to facilitate the proceedings in an action. For example, provision is made for:

- (a) Payment into court by a defendant and pleas of set-off and tender before action;³⁸
- (b) The addition, substitution and striking out of parties;³⁹
- (c) Third party proceedings;⁴⁰
- (d) Signing default judgment, in actions to recover a debt or a money demand where the defendant does not file a dispute;⁴¹
- (e) Signing summary judgment in an action for a debt or money demand involving more than \$25 upon motion by the plaintiff and when the defendant does not depose to a good defence to the action on its merits;⁴²
- (f) Taking evidence by commission and receiving evidence by affidavit in certain circumstances;⁴³
- (g) Paying judgments by instalments;⁴⁴
- (h) The payment of costs and counsel fee by an unsuccessful party;⁴⁵

³⁷*Smith v. Galin*, [1956] O.W.N. 432, 434 (C.A.).

³⁸R.S.O. 1960, c. 110, ss. 81, 82, 83.

³⁹*Ibid.*, s. 85.

⁴⁰*Ibid.*, s. 86.

⁴¹*Ibid.*, s. 88.

⁴²*Ibid.*, s. 90.

⁴³*Ibid.*, ss. 97, 98, 99.

⁴⁴*Ibid.*, s. 102(1).

⁴⁵*Ibid.*, s. 104, as amended by Ont. 1964, c. 25, s. 2(1).

- (i) An application to the judge for a new trial within 14 days after a trial or the pronouncement of judgment;⁴⁶
- (j) An appeal to a single judge or the Court of Appeal from the decision of the judge at trial or upon an application for a new trial where the sum in dispute exceeds \$200;⁴⁷
- (k) Replevin proceedings;⁴⁸
- (l) Appointing a next friend to act on behalf of a minor before a minor can commence an action, except an action to recover wages in an amount not exceeding \$100;⁴⁹
- (m) Posting security for costs where the plaintiff does not reside within the jurisdiction;⁵⁰
- (n) Issuing a judgment summons. This is a procedure comparable to the examination of a judgment debtor in the higher courts, except in the division court the judgment debtor is summoned to appear before the judge to be examined as to his assets. The judge has the power to order the judgment debtor to pay the judgment by instalments;⁵¹
- (o) Issuing a show cause summons requiring the judgment debtor, where he has failed to make payments ordered by the judge upon the return of the judgment summons, to appear before the judge, who, if satisfied that the default was wilful, may commit the judgment debtor to gaol;⁵²
- (p) Garnishee proceedings;⁵³
- (q) Garnishee before judgment. This is a procedure unique to the division courts enabling a plaintiff to garnishee monies owing to the defendant after an action has been commenced and before judgment is granted;⁵⁴
- (r) Consolidation of judgment debts. This enables a judgment debtor who has several division court judgments against him to consolidate his debts and to pay into court a certain percentage of his weekly income, which is distributed pro rata semi-annually to the judgment creditors. As long as the judgment debtor is not in default and does not incur any other judgments, the consolidation remains in effect;⁵⁵

⁴⁶*Ibid.*, s. 106.

⁴⁷*Ibid.*, s. 108, as amended by Ont. 1964, c. 25, s. 3; and s. 112 (1).

⁴⁸R.R.O. 1960, Reg. 116, Rules 13-22.

⁴⁹R.S.O. 1960, c. 110, s. 58; R.R.O. 1960, Reg. 116, Rule 31, Form 7.

⁵⁰R.R.O. 1960, Reg. 116, Form 64.

⁵¹R.S.O. 1960, c. 110, s. 130.

⁵²*Ibid.*, s. 131.

⁵³*Ibid.*, ss. 142, 143, 144.

⁵⁴*Ibid.*, ss. 151, 152, 153, 154.

⁵⁵*Ibid.*, s. 156, as amended by Ont. 1961-62, c. 35, s. 5; s. 161, as amended by Ont. 1961-62, c. 35, s. 6; s. 163, as amended by Ont. 1961-62, c. 35, s. 7; and ss. 157, 159.

- (s) Attachment of goods where the debt is for not less than \$4.00;⁵⁶
- (t) Commencing actions by and against partnerships and persons carrying on business in names other than their own.⁵⁷

In cases not expressly provided for by the Act or the regulations, the judge, in his discretion, may adopt and apply the general principles of practice and procedure in the Supreme Court to actions and proceedings in the division courts.⁵⁸

JURY TRIALS

Where the amount sought to be recovered exceeds \$50.00, either party to the action, upon notice to the clerk and payment of the proper fees for the expenses of summoning a jury, may require that the action be tried by a jury.⁵⁹ The clerk is then required to summon twelve prospective jurors from the last revised Voters' List of the division.⁶⁰ The jury consists of five members, whose verdict must be unanimous.⁶¹

Even though the parties may wish the case to be tried by a jury, the judge in certain instances may dismiss the jury and try the case himself. Such instances are:

- (a) where one of the parties to the action is a municipality in which the jurors reside;⁶²
- (b) where the jury has been in deliberation a reasonable time and cannot agree upon a verdict, and the parties consent to the discharge of the jury;⁶³
- (c) when in the opinion of the judge the action is one that ought not to be tried by a jury;⁶⁴
- (d) when in the opinion of the judge the jury notice is given for the purpose of delay.⁶⁵

On the other hand, where the judge thinks it proper to have the action or any controverted fact tried by a jury, he

⁵⁶*Ibid.*, ss. 164, 165, 167, 168.

⁵⁷*Ibid.*, ss. 182, 183, 184, 185.

⁵⁸*Ibid.*, s. 206(1).

⁵⁹*Ibid.*, s. 186(1)(2), as amended by Ont. 1962-63, c. 38, s. 2.

⁶⁰*Ibid.*, s. 187(2), 188.

⁶¹*Ibid.*, s. 192.

⁶²*Ibid.*, s. 187(6).

⁶³*Ibid.*, s. 194.

⁶⁴*Ibid.*, s. 195(4).

⁶⁵*Ibid.*, s. 195(5).

may order the clerk to instantly return a jury of five disinterested persons present in court to try the action or controverted fact, and he may then give judgment on the verdict of the jury.⁶⁶

Each juror receives a fee of \$6.00 per day for every day on which he is required to attend at court, plus an allowance of 10¢ per mile for transportation from his residence to the court. These fees are paid by the clerk of the court, who is in turn reimbursed by the treasurer of each county, or in the case of provisional judicial districts, by the Treasurer of Ontario.⁶⁷

The Division Court Jury Fund

The treasurer of each county maintains an account under the head, Division Court Jury Fund. This fund is maintained from a special surcharge imposed on plaintiffs in addition to all costs and jury fees payable.⁶⁸ The surcharge is 3¢ where the claim exceeds \$20.00 but does not exceed \$60.00; 6¢ where the claim exceeds \$60.00 but does not exceed \$100; and 25¢ where the claim exceeds \$100. Only those claims not exceeding \$20.00 are exempt from this levy. Each year the clerk must remit to the treasurer of the county the sums so collected. In the case of cities and separated towns, except Metropolitan Toronto, the amounts paid in by the clerks, and the amount returned by the county to the clerk for jury fees, are to be taken into account in settling the proportion of the charges to be paid by the city or separated town towards the cost of the administration of justice.⁶⁹ The special surcharge does not apply to provisional judicial districts.

From information made available to us, it is clear that over the past years the counties have derived a substantial profit from the Jury Fund over and above any disbursements made for jury fees out of the fund. Since no provision is made in the Act to the contrary, it may be assumed that the counties retain these funds for their own purposes. The number of jury trials requiring payment of jurors' fees is quite insignificant. In the entire province, out of 182,970 claims filed in the

⁶⁶*Ibid.*, s. 193(2).

⁶⁷*Ibid.*, s. 196.

⁶⁸*Ibid.*, s. 197(1).

⁶⁹*Ibid.*, s. 197(4).

division courts in the year 1966, fewer than fifteen were tried by a jury. In the same year litigants paid into the jury funds in the Municipality of Metropolitan Toronto the sum of \$4,325; the County of Wentworth \$868.33; and the County of Carleton \$119.89. The following table shows the Jury Fund receipts for these counties in the years 1964 and 1965.

<u>Year</u>	<u>Municipality or County</u>	<u>Jury Fund Receipts</u>
1964	Municipality of Metropolitan Toronto	\$4,758.65
1964	Wentworth	861.38
1964	Carleton	942.22
1965	Municipality of Metropolitan Toronto	4,852.15
1965	Wentworth	858.18
1965	Carleton	1,024.60

The substantial sums received by the counties in the guise of monies to be used for jury fees, in addition to the jury fees deposited with the clerk when a jury is requested, are in effect a tax levied upon litigants by the counties under the subterfuge of jury fees. It is an unjust levy and one that must finally be borne by unfortunate debtors. A collection of a jury fee for jury trials where the claim is for an amount between \$20.00 and \$50.00 is doubly unjust in that such claims cannot be tried by a jury in any case.

The whole process of trial by jury in division court actions is a relic of pioneer days. Those using the division courts appear to be almost unanimous in the opinion that jury trials are unnecessary. Fifteen jury trials out of 182,970 claims leave little room for argument. Jury trials in the division courts should be abolished.

COMMITTAL TO GAOL FOR NON-PAYMENT OF JUDGMENTS

Where a judgment is unsatisfied, the judgment creditor may apply for a judgment summons to be issued, requiring the judgment debtor to appear before the judge and be examined as to his ability to pay the judgment. If the judge makes an order requiring the judgment debtor to pay the judgment by way of instalments, and he fails to do so, the judgment creditor

may then apply for a summons requiring the judgment debtor to attend again before the judge to show cause why he has not paid the debt. If the judge finds that the default was "wilful", he may order the judgment debtor to be committed to gaol for a period not exceeding forty days for contempt of court.⁷⁰

A judgment debtor may also be committed to gaol for a period not to exceed forty days in the following circumstances:⁷¹

- (a) Where he fails to attend before a judge as required by a judgment summons or a show cause summons, or fails to give a sufficient reason for not attending;
- (b) Where he does so attend but refuses to be sworn or to answer such questions as in the opinion of the judge are proper;
- (c) Where it appears "to the judge by the examination of the party or other evidence" on the return of either type of summons, that the judgment debtor obtained credit from the judgment creditor or incurred the debt or liability under false pretences, or by means of fraud or breach of trust. (This provision is of questionable validity);
- (d) Where it appears, on the return of a summons, that the judgment debtor has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed any property with intent to defraud his creditors or any of them;
- (e) Where it appears that since the judgment was obtained against him, the judgment debtor has had sufficient means to pay all or part of the judgment without depriving himself or his family of necessities, and that he has wilfully refused or neglected to do so.

Before a committal order is enforced, the Act provides that a judgment debtor may be permitted to appear before the judge to explain his contempt. However, permission to do so is within the discretion of the judge. If the judge is not satisfied with an explanation given by the debtor, he is required to instruct the bailiff to enforce the committal order. On the other hand, if the judge is satisfied with the explanation given by the debtor, he is required to order him to attend

⁷⁰*Ibid.*, ss. 131 (3) (4), 132.

⁷¹*Ibid.*, s. 132.

at the next sittings of the court to be held for the hearing of judgment summonses. In the event that the debtor does not then attend, the presiding judge may order that he be forthwith committed to jail.⁷²

If a person is committed to jail he must remain in custody until discharged by order of the judge or until the expiration of the time described in the warrant of committal.⁷³ The imprisonment *per se* does not extinguish the judgment debt, or affect any orders for payment that may have been made, or protect the judgment debtor from being summoned anew and imprisoned for any new fraud or other default which renders him liable to be imprisoned.⁷⁴

Reliable statistics are not available to show how many debtors are committed to jail annually under the provisions of the Division Courts Act. However, the following table, compiled from information furnished by the Inspector of Legal Offices, shows the number of committals for the year 1966 in the respective courts indicated:

<i>Court</i>	<i>Committals</i>
1st Division Court County of York	30
8th Division Court County of York	Cannot be estimated
9th Division Court County of York	73
11th Division Court County of York	0
12th Division Court County of York	0
1st Division Court County of Carleton	77
7th Division Court County of Carleton	46
1st Division Court County of Wentworth	0
9th Division Court County of Wentworth	3
London (all Courts)	10
Windsor (all Courts)	28
North Bay (all Courts)	1
Oshawa (all Courts)	4

When the number of orders for committal is compared with the volume of claims filed, it becomes quite apparent that the incidence of committal for non-payment of debt is very

⁷²*Ibid.*, s. 134.

⁷³*Ibid.*, ss. 136, 137.

⁷⁴*Ibid.*, s. 140.

much higher in some counties than in others. The whole procedure whereby a debtor may be imprisoned for debt is in principle wrong and unjust. Those who have obtained judgments in higher courts have no right to apply for orders for the committal to gaol of judgment debtors for the non-payment of judgments against them. For the most part, division court judgment debtors are those of modest means for whom the threat of imprisonment is a legalized form of extortion.

The procedure by which an order of committal is obtained is repugnant to modern philosophy concerning the rights of the individual. The party is brought before the judge for examination. As a result of the hearing, the judge determines whether the default under the order for payment was wilful. The result is that in these proceedings, which are analogous to criminal proceedings for contempt of court, the accused is required by statute to give evidence which may be against himself.

As we have indicated, the Act contains further extraordinary powers of committal. "[I]f it appears to the judge by the examination of the party [the judgment debtor] or by other evidence" that he obtained credit from the judgment creditor, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust, the judge may order him to be committed to jail for any period not exceeding forty days.⁷⁵ As we indicated, this provision may be unconstitutional. In any case, the procedure is not one that should have legislative recognition in Ontario. It gives the judge arbitrary power to examine the judgment debtor, who must testify or be sent to jail, and on the evidence given by him he may be sent to jail with no right of appeal. Likewise, the judge has power to examine the judgment debtor and on his evidence or by other evidence, determine that he "has made or caused to be made any gift, delivery or transfer of property, or has removed or concealed any property with intent to defraud his creditors or any of them", and commit him to jail for forty days without right of appeal.⁷⁶ No such power to commit judgment debtors extends to the county

⁷⁵*Ibid.*, s. 132.

⁷⁶*Ibid.*, s. 132.

courts or the Supreme Court. All these powers of committal should be abolished.

The powers of committal for failure to obey a summons or to be sworn, or for disturbing the process of the court, should remain.

EXECUTION

Two distinct and different types of execution are available to judgment creditors in the division courts: the distress and sale of the goods and chattels of the debtor, and the sale of his real estate.⁷⁷ The means provided by the Act to enforce these remedies are cumbersome, complicated, and unnecessarily restrictive.

A right of an execution against lands, is available where the amount of the judgment owing exceeds \$40.00. Upon the application of the plaintiff, and upon payment to the clerk of the fee prescribed by the regulations, the clerk shall issue an execution directed to the sheriff of the county in which the judgment debtor owns land.⁷⁸ The Act provides that such an execution has the same force and effect as one issued from a county court.⁷⁹ For example, if the judgment is granted by the First Division Court of the County of York, and the judgment debtor owns a home anywhere in York County and a summer cottage in Grey County, two executions may be obtained, one directed to the Sheriff of York County and the other to the Sheriff of Grey County. No particular difficulties arise in this procedure.

It is where one wishes to levy execution against the goods and chattels of a judgment debtor that difficulties do arise. An execution against goods and chattels is separate and distinct from an execution against lands. It is directed to the bailiff, not to the sheriff. It is therefore necessary to issue two executions if the judgment debtor has both chattels and land. A writ of *feri facias* issued by the county and district courts or by the Supreme Court of Ontario is a single document and directs the sheriff to levy against *both* the goods and the lands of the

⁷⁷*Ibid.*, s. 115(1).

⁷⁸*Ibid.*, s. 125(1).

⁷⁹*Ibid.*, s. 125(2).

judgment debtor in his county. In the division court a fee must be paid to the clerk when each execution is issued. Since the clerk is remunerated on the fee basis, this may be the reason that the Act makes provision for two different procedures. No other reason is apparent.

The provisions of sections 115 (2) (3), 118 and 125 (1) (2) of the Division Courts Act, dealing with execution against goods and chattels, are difficult to reconcile.

Section 115 (2) provides that upon the request of the judgment creditor, the clerk "shall issue execution *to a bailiff of the court*, or to a bailiff of any other [division] court in the [same] county", who must then attempt to distrain the goods and chattels of the judgment debtor. However, even though section 115 (3) provides that for this purpose a bailiff has jurisdiction "throughout the county", it further provides that if he has to travel outside his division into another division in a different part of the county, he is not entitled to a mileage allowance. We have been informed that, because of this provision, and because they are remunerated on the fee basis, many bailiffs refuse to levy execution beyond the boundaries of their own division. This makes section 115 (3) quite ineffective.

Section 118 provides that, with the exception of actions brought pursuant to section 65, an execution against goods "shall *not* be executed out of the limits of the county over which the judge of the court from which the execution . . . issues has jurisdiction". Presumably, this section refers to an execution against goods only, otherwise section 125 (1), providing that an execution against lands can be directed to a sheriff of any county, would be meaningless. Again the complexity of these provisions seems to be designed more to safeguard the bailiffs' interests in fees than the public interest.

The maze of confusion in the Division Courts Act relating to execution should be resolved by devising a simple procedure whereby a judgment creditor can obtain writs of execution against the lands, goods, and chattels of the judgment debtor, which may be filed with and executed by the sheriff of any county or district in Ontario.

One other section relating to executions requires comment. Section 116⁸⁰ provides that unless the judgment creditor consents to an extension of time, "the issue of execution shall not be postponed for more than fifty days from the service of the summons". In actual practice very few division court trials are even held within fifty days from the service of the summons upon the defendant. In many counties, sittings of the court are held infrequently, often many months apart. In busy areas, such as York County or Wentworth County, it is seldom that a case is tried within fifty days after the summons is served. This section does not seem to serve any useful purpose. It should be repealed.

REORGANIZATION OF THE DIVISION COURTS

Consistent with the recommendations made in Section 5 of this Part, the Province should assume the financial and administrative responsibility for the operation of the division courts and they should be completely reorganized.

There are 219 separate division courts, each with its own clerk and bailiff. They are scattered about the province in forty-eight counties, groups of united counties and districts. In the year 1966 eighty division courts entered fewer than 200 claims, and 139 division courts entered fewer than 500 claims.⁸¹ No reliable figures can be obtained as to the number of cases that come to trial, but the Inspector of Legal Offices estimates that it would be about ten per cent of the claims entered. In the great majority of the division courts, sittings are usually held about twice a year.

Haliburton and Prince Edward each has only one division court. All of the other counties and districts are divided into two or more divisions and hence have two or more courts. In most counties all the division courts should be combined into one court; for example, the seven division courts of the County of Grey should become the Division Court for the County of Grey.

⁸⁰R.S.O. 1960, c. 110.

⁸¹See Appendix B to this chapter, p. 648 *infra*.

For administrative purposes the divisions courts should be brought under the county court system. In the less populated areas the county court clerk could perform the duties of the division court clerk. In more densely populated areas a deputy or an assistant county court clerk, or a division court clerk attached to the county court clerk's office, could perform the duties of the division court clerk. The duties of bailiff could well be performed by the sheriff of the county and his staff. To avoid mileage expense in the serving of documents, provision should be made for service, in proper cases, by registered post or through local service officers who could be paid a service fee by the sheriff.⁸² All officers should be government servants paid on a salary, as are the clerks of the Supreme and county courts.

When the division courts are reorganized, the fee system should be abolished and the tariff of fees and disbursements to be paid by litigants should be laid down by regulation.

DIVISION COURT JUDGES

Although the county and district court judges are appointed and paid by the Federal Government, by provincial statute they are also division court judges.⁸³

As we have indicated, in the larger centres of population the county court judges have not been able to fulfil their duties as division court judges, and it has been necessary for them to appoint members of the bar to sit as division court judges. Often these members of the bar come from large firms which have a wide clientele and a large practice in the personal injury field. Inevitably, clients of the firm to which the judge is attached must be interested as insurers or in other capacities in matters that come before the court, although this may be unknown to the judge. This is quite undesirable.

It is equally undesirable that members of the bar should be giving their time at \$6.00 per day to preside as judges in any court where litigants' rights are being determined. As we have said, the Province of Ontario has power to appoint

⁸²Summonses may be served under the Summary Convictions Act by post: R.S.O. 1960, c. 387, s. 6 (1).

⁸³R.S.O. 1960, c. 110, s. 1(h), as re-enacted by Ont. 1961-62, c. 35, s. 1.

any number of division court judges; to date only one has been appointed. In York County the full time of two county court judges is required for the division courts. There should be a complete reappraisal of the distribution of judicial talent in the province. This we discuss more elaborately in the succeeding chapters of this Report.

Full-time division court judges should be appointed in York County to relieve the county court judges of the major part of the division court work. In other densely populated areas full-time division court judges should be appointed to try division court cases in contiguous counties, such as Wentworth, Halton and Brant. In the less populated areas, the county court judge should continue to be the division court judge. Such a reorganization as we recommend should make for more efficient operation of the division courts, clear up confusion and reduce the burden of costs on the litigants. As long as there is a multitude of petty offices to be filled, there will be pressure on the Government to maintain the offices and increase the fees so as to justify them.

RECOMMENDATIONS

1. No change should be made concerning the informality of proceedings in the division courts.
2. The province should assume the financial and administrative responsibility for the operation of the division courts and they should be completely reorganized.
3. In all counties the division courts should be combined into one court, and for administrative purposes the division court should be brought under the county court system.
4. The offices of the division court ought not to be operated in connection with any other employment.
5. In less populous areas the county court clerk should perform the duties of the division court clerk. In the more densely populated areas there should be a deputy or assistant county court clerk, or a division court clerk attached to the county court clerk's office, to perform the duties of the division court clerk.

6. The bailiff's duties should be performed by the sheriff of the county and his staff.
7. Payment of officers on the fee system should be abolished.
8. All division court officers should be government servants paid on a salary.
9. The division court jury fee should be abolished.
10. Jury trials in the division court should be abolished.
11. The practice of appointing practicing members of the bar to be *ad hoc* judges of the division court should be discontinued.
12. Full-time division court judges should be appointed in York County to relieve county court judges of most of the division court work, and in other populous areas full-time division court judges should be appointed to try division court cases in contiguous counties. In less populated areas the county court judge should continue to be the division court judge.
13. The following powers of committal for contempt should be abolished:
 - (a) Committal for wilful default under an order of a judge to pay a judgment debt;
 - (b) Committal where it appears to the judge that the judgment debtor obtained credit from the judgment creditor, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust;
 - (c) Committal where it appears to the judge that the judgment debtor "has made or caused to be made any gift delivery or transfer of property or has removed or concealed any property with intent to defraud his creditors. . . ."
14. Power to commit for failure to obey a summons or to be sworn, or for disturbing the process of the court, should remain.
15. The confusion in the Division Courts Act relating to execution should be resolved by devising a simple procedure whereby a judgment creditor can obtain a single

writ of execution against the lands, goods and chattels of the judgment debtor, which writ may be filed with and executed by the sheriff of any county or district in Ontario.

16. The Division Courts Act, section 116, which provides that unless the judgment creditor consents to an extension of time, "the issue of execution shall not be postponed for more than fifty days from the service of the summons", should be repealed.
17. Provision should be made for service by registered post in proper cases, or through local service officers who could be paid a service fee by the sheriff.
18. The tariff of fees and disbursements to be paid by litigants should be laid down by regulation.

APPENDIX

A

Distribution of Division Courts in 1966

COUNTY OR DISTRICT	NUMBER OF COURTS	NUMBER OF CLAIMS ENTERED	COUNTY OR DISTRICT	NUMBER OF COURTS	NUMBER OF CLAIMS ENTERED
Algoma	5	4,631	Nipissing	2	2,284
Brant	3	2,473	Norfolk	6	1,135
Bruce	7	1,227	Northumberland		
Carleton	3	11,903	& Durham	7	2,222
Cochrane	6	4,117	Ontario	6	4,255
Dufferin	3	401	Oxford	5	3,772
Elgin	3	2,078	Parry Sound	2	645
Essex	6	5,931	Peel	2	3,537
Frontenac	3	2,879	Perth	4	2,052
Grey	7	1,323	Peterborough	2	3,516
Haldimand	2	314	Prescott & Russell	5	1,550
Haliburton	1	174	Prince Edward	1	696
Halton	5	3,347	Rainy River	2	1,307
Hastings	8	2,897	Renfrew	5	2,031
Huron	8	1,903	Simcoe	6	4,750
Kenora	4	1,407	Stormont, Dundas		
Kent	5	2,898	& Glengarry	7	3,390
Lambton	4	2,351	Sudbury	4	6,706
Lanark	5	1,385	Temiskaming	4	1,985
Leeds & Grenville	8	2,220	Thunder Bay	7	5,341
Lennox &			Victoria	2	1,048
Addington	2	617	Waterloo	4	6,053
Lincoln	2	2,941	Welland	5	5,989
Manitoulin	2	118	Wellington	5	3,222
Middlesex	6	5,520	Wentworth	4	8,742
Muskoka	3	912	York	11	40,775
Total				219	182,970

APPENDIX

B

Volume of Claims in the Division Courts in 1966

14	courts	had	0-50	claims
23	”	”	51-100	”
43	”	”	101-200	”
29	”	”	201-300	”
19	”	”	301-400	”
11	”	”	401-500	”
36	”	”	501-1,000	”
19	”	”	1,001-2,000	”
11	”	”	2,001-3,000	”
4	”	”	3,001-4,000	”
4	”	”	4,001-5,000	”
6	”	”	Over 5,000	”

Section 2

THE SUPREME COURT OF ONTARIO

CHAPTER 43

Trial Courts

HIGH COURT OF JUSTICE FOR ONTARIO

THE Supreme Court of Ontario consists of two branches, the High Court of Justice for Ontario and the Court of Appeal for Ontario. The High Court exercises tripartite jurisdiction. It is a superior court of first instance for the trial of civil and criminal cases, and in addition it exercises the common law and statutory powers of judicial review, together with certain appellate jurisdiction. In this chapter we shall deal only with the jurisdiction exercised by the court as a trial court. The jurisdiction of the court that is of an appellate nature, including judicial review, will be dealt with in the next chapter.

In Chapter 41 we discussed at some length the civil and criminal jurisdiction exercised by the High Court in relation to that exercised by the county courts and the General Sessions of the Peace. The court consists of the Chief Justice of the High Court, who is president of the court, and twenty-four other judges. (An increase of two judges was authorized by the Ontario Legislature in 1967,¹ but complementary legislation has not at the time of writing been passed by Parliament). All judges of the High Court are *ex officio* members of the Court of Appeal for Ontario, and all judges of the Court of Appeal are *ex officio* members of the High Court. As we have indicated in Chapter 41, the court has jurisdiction to try all

¹Judicature Act, R.S.O. 1960, c. 197, s. 5 (1), as amended by Ont. 1967, c. 41, s. 1.

indictable offences and all civil actions, with the exception of those within the jurisdiction of the surrogate court² which do not come within the specific provisions of the Judicature Act conferring jurisdiction on the Supreme Court. This provision of the Judicature Act does not appear in the 1960 consolidation of the statutes, but it is unrepealed. It reads:

"38. The High Court shall have jurisdiction to try the validity of last wills and testaments . . . and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments."³

The comparative jurisdiction of the Supreme Court and the county court has been fully discussed in Chapter 41 and there we have made certain recommendations with respect to the redistribution of the case load in both civil and criminal cases.

We emphasize that it is undesirable to be continually increasing the number of judges of the High Court in order to have a sufficient number to try the cases under the present jurisdictional distribution. In the last seventeen years, the number of members of the High Court has been increased from fifteen to twenty-seven. The continued increase in numbers will constitute an unwieldy court which must necessarily dilute the quality of the judges appointed, with the result that the competence of the judges will not be equal to the difficult and complex cases that must necessarily come before the court. The High Court of Justice ought not to be concerned with cases that present little difficulty in law or fact. It is a court where jurisprudence should be fashioned in the first instance and it should be so constituted as to be equal to this task. If lawyers of the competence required to try difficult and important cases are to be attracted to the bench, cases of lesser importance must be reserved for other courts.

The High Court is a circuit court. The judges sit throughout the province in the forty-eight judicial districts on dates predetermined by the judges semi-annually. At least

²R.S.O. 1960, c. 388, s. 21.

³R.S.O. 1897, c. 51, s. 38.

one sitting of the court must be held every six months in each judicial district. In most centres four sittings are held annually, two for the trial of cases with and without jury, and two for the trial of cases without jury. In the large metropolitan centres, courts sit almost continuously, and in Metropolitan Toronto several courts sit throughout the respective terms.

From time to time the circuit system has been the subject of some criticism. It has been suggested that the province should be divided into districts with one or more resident High Court judges appointed to each district. In theory this suggestion may appear to have some merit. In practice any advantages derived from it would be outweighed by the disadvantages. Under the circuit system, the judicial force of the court is flexible. If the requirements of one county are less than anticipated, the judge assigned to that court may be reassigned to another court where the case load is heavier than anticipated. In addition, it must be acknowledged that some judges have more expertise in some branches of the law than others. Under the present system, with the co-operation of the bench and bar, the courts can be most efficiently operated to distribute the judicial strength of the courts throughout the Province.

Judges, as any other body of men in any walk of life, have to be subject to wise discipline, and discipline is much easier to maintain with the intimate and helpful relationship that now exists in the court. Daily association with one another inevitably improves the quality of the judges. We do not recommend any change in the circuit system. A reorganization of the High Court of Justice in relation to its appellate functions and the exercise of its powers of judicial review, will be discussed in the next chapter.

CHAPTER 44

Appellate Courts

IN Chapter 15 we discussed the nature and principles of an appeal, and in Chapter 51 we deal with appeals from conviction for offences against the provincial law. In Subsection 5 of Section 2 of Part I we dealt fully with the subject of judicial review.¹ A court hearing an application for judicial review is not hearing an appeal in the true sense. It has no power to give a decision on the merits, but in essence, in one aspect, the object of the application is the same as an appeal: to set aside a decision of an inferior tribunal that is adverse to the applicant and render it inoperative. For reasons that will be apparent, we discuss judicial review in this chapter in relation to the subject of the constitution of appellate courts and include it in the term “jurisdiction of an appellate nature”.

We are concerned here with appeals to the courts as distinct from appeals from one administrative body to another administrative body. We shall discuss and make recommendations with respect to the constitution and jurisdiction of appellate courts for the Province in so far as the relevant matters lie within the jurisdiction of the Province. Rights of appeal against convictions for breaches of federal statutes are governed by federal legislation. The extent of the Province’s jurisdiction to create courts or tribunals to hear appeals against decisions of all statutory tribunals, and convictions for breaches of provincial law, and to appoint the judges to preside over them, need not be discussed here. This has never been attempted and for reasons given elsewhere in this Report we think it would be unwise to do so.

¹See pp. 237 ff. *supra*.

The principles underlying the practice of allowing ultimate appeals from judicial decisions to the regular courts is the best safeguard for the rights of the individual and one that should be vigilantly protected. It is in the light of this conclusion that we consider jurisdiction of an appellate nature exercised by the courts, and make our recommendations for legislative action.

APPELLATE JURISDICTION

There are six tribunals within the structure of the regular courts on which appellate jurisdiction has been conferred: judges of the county and district courts; county and district courts; judges of the Supreme Court of Ontario; the Supreme Court of Ontario; judges of the Court of Appeal for Ontario; and the Court of Appeal for Ontario. An analysis of the rights of appeal² from statutory tribunals to the judges of the courts or to the respective courts shows that rights of appeal lie:

- (1) To a county or district court judge under 30 statutes;
- (2) To the county or district courts under one statute;
- (3) To a local judge of the Supreme Court of Ontario under two statutes;
- (4) To the Supreme Court of Ontario under 18 statutes;
- (5) To the Supreme Court of Ontario or judge thereof under one statute;
- (6) To a judge of the Court of Appeal under 7 statutes;
- (7) To the Court of Appeal for Ontario under 74 statutes; and
- (8) To the Court of Appeal for Ontario to be heard by one judge thereof under one statute.

These rights of appeal are quite apart from appeals in ordinary cases under the Judicature Act, the County Courts Act, the Judges' Orders Enforcement Act, the Surrogate Courts Act, the Division Courts Act, the Summary Convictions Act, and the Assessment Act.³

One can find no philosophy nor pattern governing rights

²See Appendices A, B, C and D, pp. 672 ff. *infra*.

³R.S.O. 1960, c. 23.

of appeal nor determining to what court the appeal should lie. In some cases a right of appeal is given from a tribunal consisting of three or more members to a single judge of the Supreme Court, for example, the Board of Commissioners of Police, in which case the judgment of the single judge is final.⁴ Under the Surveyors Act, an appeal from an order of the Council expelling a member from the profession, is to a judge of the Supreme Court, with a further appeal to the Court of Appeal,⁵ while under the Public Accountancy Act, the appeal is to a judge of the Supreme Court, whose decision is final.⁶ Under the Dentistry Act, the appeal from a decision of the Board is taken directly to the Court of Appeal.⁷ Under the Assessment Act an appeal lies from the Court of Revision to the county judge, and from the county judge to the Municipal Board, and from the Municipal Board to the Court of Appeal;⁸ or there may be a direct appeal from the decision of the county judge to the Court of Appeal by way of stated case.⁹

Within the hierarchy of the courts the pattern of appeals is equally confused. There is no appeal from a judgment of a county court judge sitting as a judge of the division court, unless the sum in dispute exceeds \$200.¹⁰ Where the sum in dispute exceeds \$200, the appeal is to the Court of Appeal, but it is heard by a single judge of the Court of Appeal.¹¹ Under the Creditors' Relief Act,¹² if an order made by a county judge involves a sum greater than \$100, the appeal is to the full Court of Appeal. Under the Mechanics' Lien Act, an appeal lies to the Court of Appeal from a county judge as a local judge of the Supreme Court, in respect of claims exceeding \$200.¹³

⁴Municipal Act, R.S.O. 1960, c. 249, s. 247 (9).

⁵R.S.O. 1960, c. 389, s. 36.

⁶R.S.O. 1960, c. 317, s. 22.

⁷R.S.O. 1960, c. 91, s. 27 (1), as re-enacted by Ont. 1966, c. 38, s. 14.

⁸R.S.O. 1960, c. 23, s. 75, as amended by Ont. 1961-62, c. 6, s. 7; s. 83, as amended by Ont. 1961-62, c. 6, s. 8, and as further amended by Ont. 1966, c. 10, s. 15.

⁹*Ibid.*, s. 84.

¹⁰Division Courts Act R.S.O. 1960, c. 110, s. 108, as amended by Ont. 1964, c. 25, s. 3.

¹¹*Ibid.*, s. 112(1).

¹²R.S.O. 1960, c. 78, s. 38.

¹³R.S.O. 1960, c. 233, s. 40.

Where appellate jurisdiction is given to a county or district court judge, a Supreme Court judge or a judge of the Court of Appeal as *persona designata*, no appeal lies to the Court of Appeal except by leave of the judge who made the order, or by leave of the Court of Appeal, unless a right of appeal is expressly given by statute.¹⁴ Where the statute creating the right of appeal states that the decision of the judge to whom the appeal may be taken is final, as in the case of the Air Pollution Control Act,¹⁵ the provisions of the Judges' Orders Enforcement Act do not apply and no appeal may be taken to the Court of Appeal.

A study of the tables forming Appendices A, B and C^{15a} to this chapter demonstrates that the civil rights of the individual have played little part in the legislative schemes creating rights of appeal and determining what courts should be appellate courts. Under the Air Pollution Control Act the decision of the county or district court judge on appeal may involve thousands of dollars or extensive injury to health; nevertheless, it is the decision of a single county or district court judge and it is final. Likewise, an appeal to a county or district court judge under section 19 (6) of the Fire Marshals Act is final.¹⁶

It is an anomaly that an appeal lies from a county or district court judge to the Court of Appeal from all judgments delivered while he is sitting as a county or district court judge, no matter how small the amount involved may be, but in other matters, while sitting as *persona designata*, no appeal lies without leave unless specifically provided, although the amount involved may be very large.

The same may be said of decisions of Supreme Court judges while they are exercising certain appellate jurisdiction. Under the Optometry Act, 1961-62, an appeal lies from a decision of the Board to a judge of the Supreme Court.¹⁷ The decision is final, notwithstanding that it may bar an optometrist

¹⁴Judges' Orders Enforcement Act, R.S.O. 1960, c. 196, s. 3; see *Re Hynes and Swartz*, [1937] O.R. 924.

¹⁵R.S.O. 1960, c. 12, ss. 4 (2), 7 (5).

^{15a}See pp. 672ff. *infra*.

¹⁶R.S.O. 1960, c. 148 s. 19 (6), as amended by Ont. 1960-61, c. 29, s. 1.

¹⁷Ont. 1961-62, c. 101, s. 11(5).

from practising for the rest of his life. On the other hand, an appeal lies from a decision of a similar character under the Private Investigators and Security Guards Act, 1965,¹⁸ to a justice of the Court of Appeal. The justice of the Court of Appeal acts as *persona designata* and his decision is subject to appeal with leave to the Court of Appeal under the Judges' Orders Enforcement Act.¹⁹

It is also an anomaly that under the Employment Agencies Act²⁰ and under the Liquor Control Act²¹ an appeal lies to a county court judge with respect to licensing; while on the other hand, under many licensing statutes, appeals from decisions of licensing bodies are either to a judge of the Supreme Court, e.g., the Municipal Act,²² or direct to the Court of Appeal, e.g., the Professional Engineers Act,²³ the Pharmacy Act,²⁴ and the Securities Act, 1966.²⁵

These anomalies are hard to understand and it is equally hard to understand why barristers, solicitors, dental technicians and drugless practitioners have no right of appeal in disciplinary matters. The statutes applicable to self-governing professions are dramatic illustrations of the injustice of the statutory provisions which determine the respective courts that should exercise appellate jurisdiction.

Appellate Jurisdiction Exercised by Judges of the Supreme Court

Jurisdiction of an appellate nature, as we use the term in this chapter, exercised by the judges of the Supreme Court, whether acting as *persona designata* or as judges exercising the jurisdiction of the court, falls into two broad classes: statutory appeals, and the common law and statutory jurisdiction of the court to supervise, through judicial review, all inferior

¹⁸Ont. 1965, c. 102, s. 21.

¹⁹R.S.O. 1960, c. 196, s. 3.

²⁰R.S.O. 1960, c. 121, s. 6 (3).

²¹R.S.O. 1960, c. 217, ss. 55, 55a as enacted by Ont. 1965, c. 58, s. 33; and s. 140 (1).

²²R.S.O. 1960, c. 249, s. 247 (9).

²³R.S.O. 1960, c. 309, s. 28 (4).

²⁴R.S.O. 1960, c. 295, s. 29 (5), as re-enacted by Ont. 1966, c. 115, s. 6 (2).

²⁵Ont. 1966, c. 142, s. 29.

courts and tribunals in the exercise of the jurisdiction conferred on them.

We deal with judicial review here only in relation to the court exercising the original jurisdiction of review. Statutory appeals lie to a single judge of the Supreme Court in all the cases set out in Appendix B to this chapter.^{25a} These include not only appeals from administrative tribunals, but also appeals from decisions of county and district court judges in interlocutory matters, and appeals in certain cases from magistrates.

Appellate Jurisdiction of the Court of Appeal

The Court of Appeal consists of ten judges. Its jurisdiction may be exercised by an uneven number of at least three judges, except in the cases of appeals in division court matters, where the jurisdiction is exercised by a single judge.

In addition to the jurisdiction conferred on it as the highest court of appeal in the hierarchy of courts in the Province, under the Judicature Act, the County Courts Act and the Surrogate Courts Act, the Court of Appeal exercises an appellate jurisdiction given to it under at least seventy-four Ontario statutes,²⁶ and many federal statutes including the Criminal Code.

By reason of the burden of the caseload in the Court of Appeal, the quorum is usually three. This we shall discuss later.

Although the burden of the caseload cannot be measured by statistics alone, they form a basis for consideration. In 1966 the Court of Appeal heard 417 appeals in civil cases, in addition to motions and applications incidental thereto. Of this number 70 appeals were from division court judgments; 140, from judgments of judges of the county and district courts and surrogate courts; 186, from judgments of judges of the High Court of Justice; and 21, from tribunals. In addition, the court heard 596 appeals involving indictable offences, 538 of which were appeals by convicted persons and 58 by the Crown. The court also dealt with appeals in writing, submitted by accused persons in custody who had been convicted of indictable

^{25a}See pp. 673-74 *infra*.

²⁶See Appendix C to this chapter, pp. 674-77 *infra*.

offences. In 1966 there were 425 "in writing" applications for leave to appeal. It is a safe conclusion that since that time they have increased in number. During the year 1966 the court did not sit once with five judges to hear civil appeals and in only three criminal cases did five judges preside. But the work of the court can be only partially measured by the number of cases. One complex case may take many days to argue and the writing of the judgment may take much more time than the hearing of the argument.

The confused pattern, or absence of pattern or principle, in the conferment of appellate jurisdiction on the courts, and the caseload that the Court of Appeal now bears and will bear in the foreseeable future, make it imperative that a comprehensive reorganization of the appellate jurisdiction of the courts be undertaken at once. This reorganization is urgently necessary if we are to sustain the elementary civil rights of the individual to have a simple, expeditious and reasonably inexpensive right of appeal to the courts. The necessary reformation must be undertaken not only with a view to the immediate and urgent necessities of the present, but particularly to meet the needs of the future as the population and economy of the province grow.

The population of Ontario as of June 1, 1966, was 6,895,000. This represents an increase of 2,500,000 since 1960. The most conservative projection is that the population of Ontario will be 8,334,000 in 1976 and 10,387,000 in 1986. Another projection places the figures at 8,753,000 and 11,160,000 respectively.²⁷

The history of the last ten years has shown that with the industrial, commercial and financial growth and development of the Province the number of heavy and important cases in the courts has multiplied and the number of statutory tribunals which must be regulated and supervised by the courts has increased. The impact of the Legal Aid Act²⁸ on the appellate work of the courts cannot yet be assessed, but there is no doubt that it will be considerable.

²⁷Population Statistics for Ontario, August, 1966, prepared by the Manpower Section, Economic Analysis Branch of the Chief Economist, Ontario Department of Economics and Development.

²⁸Ont. 1966, c. 80.

The labours of a judge, and particularly a judge of a court of appeal, are by no means confined to the courtroom. The body of law that must be mastered is constantly expanding; new statutes are passed yearly and new cases are constantly being reported. Over 1500 new cases are reported in Canada each year. The highest court of the Province must be vigilant to see that its decisions are consistent with the development of the law, not only in Canada but in England and in other Commonwealth countries administering the common law.

Under present conditions it is quite impossible for the judges of the Court of Appeal in Ontario adequately to meet their responsibility as judges of the court of last resort in the Province. They are compelled, by force of circumstances, to dispose of cases on a sort of assembly-line basis. They are forced to choose between the prompt disposition of appeals by a court of three judges, and the painstaking deliberation by a court of five judges which the work of an ultimate court of appeal for the Province demands. Rather than have long delays and a large backlog of appeals the choice has wisely been made for the former. It is not right that such a choice should have to be made, nor is it right that litigants should have to be put to the great expense of appealing to the Supreme Court of Canada before they can get decisions by at least a five-judge court in matters justifying an appeal to the highest court of the Province.

Having regard to the importance and expense of such an appeal, it is essential that all appeals in the court of last resort in the Province should be heard by at least five judges. Much dissatisfaction is aroused in the mind of a litigant who has had a favourable decision at trial, but has had an unfavourable one on appeal by a majority of two to one. In such a case, two judges have decided in the litigant's favour and two against him, but he must accept defeat or appeal to the Supreme Court of Canada. Even with five judges presiding in the Court of Appeal, two dissenting judges might produce a similar result, but the incidence of such similarity would be very low if all appeals were heard in the Court of Appeal by at least five judges.

REFORMATION OF THE APPELLATE STRUCTURE OF THE COURTS

Accepting the premise that reform of the appellate structure in the courts is essential, we ask ourselves what should be the nature of the reform. Does the answer lie in the restriction of rights of appeal by the abolition of certain rights, and the allowance of others only with leave? Such a course would be contrary to an advanced policy of protecting civil rights. Rights of appeal to the courts should be enlarged rather than curtailed. The fact that a right of appeal exists always has a salutary disciplinary effect on the tribunal from whose decision the appeal lies, be it a court or an administrative body. The simpler and speedier the process of appeal, the more effective is the disciplinary force and the firmer is the foundation on which the administration of justice rests. We reject any proposal to curtail rights of appeal. As we have emphasized throughout this Report, these rights should be enlarged and the way of appeal should be made easier for the litigant.

A second alternative to be considered is to make provision for an enlargement of the Court of Appeal by adding more judges so that it may sit in two or more divisions in which a quorum would be five. This suggestion we reject on several grounds. It would tend to dilute the quality of the judges of the Court of Appeal and depreciate the prestige and authority of the court. The development of jurisprudence in a large province demands that it be the task of a small number of highly trained and thoroughly experienced judges. This has been the practice and experience in all countries of the English-speaking world.

In England, with a population of 55 million, the Court of Appeal consists of the Master of the Rolls and ten Lord Justices. It is true that the Lord Chancellor, the Lord Chief Justice and the President of the Admiralty, Probate and Divorce Court are officially members of the court, but rarely do they sit as judges of the court. Only nine judges constitute the Supreme Court of Canada, and similarly nine judges constitute the Supreme Court of the United States. No state

in the United States has more than nine judges in its highest Court of Appeal and eighty per cent have either five or seven judges.²⁹

The addition of more judges to the Court of Appeal would perpetuate and increase the undesirable features that now exist, due to the court's sitting in divisions, and tend to produce inconsistent decisions and "jockeying" for courts.

It has been suggested, as a third alternative, that an intermediate court of appeal should be created, through which appeals would pass before reaching the Court of Appeal, or which would exercise a final appellate jurisdiction in less important matters. We agree that there should be a court to exercise an appellate jurisdiction inferior to that of the Court of Appeal. All states in the United States with a population comparable to that of Ontario have intermediate Courts of Appeal as part of the appellate structure. However, we do not think that the problems involved in providing proper and simple access for the litigant to appellate decisions can be solved merely by creating an intermediate court of appeal with some limitation on jurisdiction. This would add another tier in the judicial structure, and that is to be avoided if possible. It would not provide a comprehensive scheme to give direct and adequate relief to the litigant at a minimum cost. This is essential to the protection of the rights of the individual.

We think the reformation of the appellate structure of the courts should be considered by first taking into account the different processes of reviewing decisions of courts and tribunals. In applications for judicial review by way of prohibition, *mandamus*, *certiorari* and other common law relief, and by way of a stated case and statutory appeals, the objective is the same: to correct errors in the administration of justice. It matters not whether the decision of the tribunal involved has been one of an administrative officer, an administrative board, a justice of the peace, a magistrate or a county court judge. The application to alter, set aside or reverse the decision of the inferior tribunal, has many of the characteris-

²⁹Report on Judicial Administration, Maryland Bar Association (1965), 11.

tics of an appeal, although all the characteristics of a true appeal are not always present.

In reorganizing the appellate structure of the courts a primary objective should be to reduce the expense and delay in getting a decision by more than one judge in the matter under review. Under the present procedure by way of judicial review, for example, in cases of prohibition, *mandamus*, and *certiorari*, the applicant must first apply to a single judge of the Supreme Court before the case may reach an appellate court where more than one judge may participate in the decision. Likewise, in most of the cases where an appeal is taken by way of stated case, the appeal is first heard by a single judge with a further appeal to the Court of Appeal, in some instances by leave only.³⁰

In interlocutory matters, appeals from decisions of county and district court judges are heard by a single judge of the Supreme Court with no further right of appeal. This is true, notwithstanding that the case in which the interlocutory application arose in the county court involved a matter that was within the jurisdiction of the Supreme Court. Appeals from the Master of the Supreme Court in interlocutory matters are heard by a single judge of the Supreme Court with a right of appeal to the Court of Appeal, by leave of a judge of the Supreme Court.

CONCLUSIONS

The solution of the problems arising from the burden on the Court of Appeal, and from the creation of statutory rights of appeal, together with making provision to facilitate rights of judicial review, does not lie in setting up an intermediate court of appeal so as to provide a screening process through which certain appeals must pass, and to provide a final court in minor matters. Such a solution would simply multiply appeals and add to the expense of litigation, thereby weighting justice in favour of those who can afford the expense.

In making provision for the hearing of applications for relief against decisions of all bodies authorized to decide any-

³⁰The statutes providing for appeals by way of stated case are set out in Appendix D to this chapter, p. 677 *infra*.

thing, whether the applications be by way of a stated case, the conventional appeal, or judicial review, the convenience of the individual seeking relief should be paramount. The process should be designed to give the best result possible with the least delay and at the least expense. There is undoubtedly a class of appeals that should go to the county and district court judges. In most cases appeals, that now lie to the county and district court judges should continue to do so, except where the decision of the tribunal vitally affects rights, or substantial amounts of money are involved. In those cases an appeal should lie to the Supreme Court of Ontario. With the exception of the appeals that ought to lie to the county and district court judges, and with the possible exception of some interlocutory appeals from the Master, all applications in the nature of appeals and judicial review should in the first instance be heard by a court consisting of at least three judges. To this end we recommend that an Appellate Division of the High Court of Justice for Ontario be constituted on the model of the English system, but with an extended jurisdiction.

We had the privilege of discussing the matter of the structure of the courts with Lord Parker, the Lord Chief Justice of England, who is a most distinguished guardian of the civil rights of the individual. He said:

"Appeals from disciplinary bodies go sometimes to the Privy Council and sometimes to the Divisional Court. The more usual practice today is to provide that such appeals should go to the Divisional Court and by way of re-hearing on fact and law according to the practice of the Court of Appeal.

I take the view that looking to the future and even today, the jurisdiction to grant prerogative orders is one of the most important jurisdictions. If Parliament in its wisdom refuses to provide an appeal from an administrative tribunal or administrative processes, the old supervisory jurisdiction of the Court provides the only safeguard for the subject. It is therefore, I think, only right that the Court exercising this jurisdiction should be manned by three Judges.

Indeed, I have always taken the view that the Divisional Court work and most certainly in regard to prerogative orders, is so important that the Chief Justice should preside and thus ensure a uniformed practice."

The Appellate Division of the High Court of Justice should be required to sit with a quorum of at least three judges and not more than five. It should be presided over by the Chief Justice of the High Court for Ontario. The Chief Justice would have the judicial experience of at least twenty-five judges to draw on in assigning members to the court from time to time. Judges should only be assigned with regard to their experience and expertise in relation to matters coming before the court, and particularly in relation to administrative law. This is essential in promoting the recommendations we have made with respect to the development in Ontario of some of the best features of administrative courts, such as the *Conseil d'Etat*,⁸¹ without performing a radical operation on the whole judicial system and the structure of the courts, which system has become a part of the processes of government under which we live.

DISTRIBUTION OF APPELLATE JURISDICTION

We have given much thought to the distribution of the appellate jurisdiction between the Court of Appeal and the Appellate Division of the High Court. We have considered the suggestion that a rules committee be set up to define the jurisdictions of the respective courts and revise them from time to time. This would be a delegation of legislative power which would not be consistent with the proper safeguards for the rights of the individual as recommended in this Report. A right of appeal is a matter of substantive law and not procedure.⁸² Likewise it is a matter of substantive law to confer jurisdiction on a court to hear an appeal.

As we have emphasized, a right of appeal from a decision affecting civil rights is the best-known insurance against the arbitrary exercise of power. It necessarily follows that the body to define rights of appeal, and to define the court to hear appeals, should be the Legislature, where the matter may be debated under the searchlight of public criticism. We can find no precedent for delegating to a rule-making body the legislative power of determining to which courts appeals should go

⁸¹See Report Number 2.

⁸²*Kelly v. Sullivan* (1876), 1 S.C.R., 1.

and what jurisdiction the appellate courts should have. We think the jurisdiction of the Appellate Division of the High Court and the Court of Appeal should be defined by statute on definite principles, and not as a matter of expediency. However, the procedure to be followed in appeals should be left as it now is to the rules committee, constituted under the provisions of the Judicature Act. If the Attorney General wishes an advisory committee with which to consult with respect to the legislation which should be recommended to define the jurisdiction of courts, such a committee could be constituted on an *ad hoc* basis without giving it legislative power.

Jurisdiction of the Appellate Division of the High Court of Justice

The Appellate Division of the High Court of Justice should hear: all applications for judicial review³³ in the first instance; all appeals by way of stated case, whether from administrative tribunals or from justices of the peace or magistrates; all appeals from administrative tribunals, including all of the self-governing bodies, except appeals from the Lands Tribunal, the appointment of which we recommend in Chapter 69; all appeals from judgments of judges of the county and district courts and the surrogate courts exercising a compulsory jurisdiction, whether acting as *persona designata* or in their capacity as judges of the court, but not including matters within the ordinary jurisdiction of the Supreme Court heard in the exercise of the optional jurisdiction of these courts; all division court appeals; and all appeals from the Master of the Supreme Court except decisions in minor interlocutory matters.

Except in those cases where the appeal is from a judge at trial, the procedure on appeal to the Appellate Division of the High Court of Justice should be by way of a summary notice of motion, as is the case under the present practice in an appeal from a Master of the Supreme Court or on an application for *mandamus*.

³³See Part I, Section 2, Subsection 5, pp. 237ff. *supra*.

The court should keep a running list of appeals to which appeals may be added from day to day as they are set down. A practice of establishing monthly lists would impede expeditious hearings. On the other hand, dates for hearings could be fixed by administrative process to meet the convenience of parties. It is not our function to work out the details of procedure, but the important principle is the creation of an appellate court of first instance to hear all matters of an appellate nature, except those specially reserved for the Court of Appeal.

Jurisdiction of the Court of Appeal

A direct appeal should lie to the Court of Appeal from all final judgments of judges of the High Court of Justice, from final judgments of the surrogate court and the county and district courts when the judgment is one that would be within the alternative jurisdiction of the Supreme Court, and from the Lands Tribunal.

In *habeas corpus* matters the Appellate Division of the High Court should exercise the jurisdiction now conferred on the Court of Appeal under section 8 of the Habeas Corpus Act.³⁴ In these cases, an appeal should lie to the Court of Appeal as of right from decisions of the Appellate Division of the High Court, at the instance of a person remanded into custody.

An appeal should lie to the Court of Appeal with leave of the court from any judgment of the Appellate Division of the High Court, where in the opinion of the Court of Appeal important questions of law are involved.

In addition to the advantage of providing a specialized administrative court of appeal, the proposed appellate structure would relieve an intolerable situation that has developed in past years in the disposition of matters that come before the sittings of the "Weekly Courts" in Toronto.

To lawyers the term Weekly Court has a meaning, but to laymen the title of the court conveys nothing. It is not a court that sits weekly, but daily, to hear motions in court or in chambers. These may involve difficult appeals from many

³⁴R.S.O. 1960, c. 169.

different tribunals, matters of judicial review and arguments with respect to the construction of wills, contracts and statutes. On the other hand, the matters that come before Weekly Court may be purely formal motions that last but a few minutes. There may be as many as fifty or sixty of these motions on the list for one day. This is not the type of court to exercise appellate jurisdiction. Long arguments may detain many counsel waiting to be heard in succeeding cases, and not infrequently the balance of the list has to be put over to another day. This is a frustrating and expensive process. If all the matters of an appellate nature were heard by a truly appellate court, order could be restored to the processes of the Weekly Court to the relief of litigants, their counsel and the strain on judges.

CONCLUSIONS AND RECOMMENDATIONS

1. A comprehensive reorganization of the appellate jurisdiction of the courts must be undertaken.
2. The reorganization must be undertaken not only with a view to the immediate and urgent necessities of the present but particularly to meet the needs of the future as the population and economy of the Province grow.
3. All appeals to the highest Court of Appeal in the Province should be heard by at least five judges.
4. Rights of appeal should be enlarged rather than curtailed, and the method of appeal should be simplified.
5. There should not be any addition to the number of judges of the Court of Appeal, but there should be a court to exercise an appellate jurisdiction inferior to that of the Court of Appeal.
6. The primary objective should be to reduce the expense and delay in getting a decision by more than one judge in the matter under review.
7. No alteration should be made in appeals that lie to the county and district court judges, except where the decision of the tribunal vitally affects rights, or substantial amounts of money are involved. In such cases an appeal should lie to the Supreme Court of Ontario.

8. With the exception of appeals that should lie to the county and district court judges, and of some minor interlocutory appeals from the Master of the Supreme Court, all applications in the nature of appeals and judicial review should be heard by a court of at least three judges at the initial hearing.
9. An Appellate Division of the High Court of Justice for Ontario should be constituted on the model of the English system, but with an extended jurisdiction.
10. The Appellate Division of the High Court of Justice should be required to sit with a quorum of an uneven number, not fewer than three and not more than five judges.
11. The Appellate Division of the High Court should be presided over by the Chief Justice of the High Court for Ontario.
12. The Chief Justice of the High Court should assign members to the court from time to time, having regard for their experience and expertise particularly with regard to administrative law.
13. The jurisdiction of the Appellate Division of the High Court and the Court of Appeal should be defined by statute on definite principles.
14. The procedure on appeals should be left to the rules committee as presently constituted under the Judicature Act.
15. If the Attorney General wishes an advisory committee with which to consult prior to his recommending legislation which would define the jurisdiction of the courts, such a committee should be constituted on an *ad hoc* basis and without legislative power.
16. The Appellate Division of the High Court of Justice should hear:
 - (a) All applications for judicial review in the first instance;
 - (b) All appeals by way of stated case, including those from administrative tribunals;

- (c) All appeals from administrative tribunals, including self-governing bodies, except from the Lands Tribunal;
 - (d) All appeals from judgments of judges of the county and district courts and surrogate courts exercising a compulsory jurisdiction, as *persona designata* or in their capacity as judges of the court, but not including matters heard while exercising optional jurisdiction;
 - (e) All division court appeals;
 - (f) All appeals from the Master of the Supreme Court, except decisions in minor interlocutory matters;
 - (g) All *habeas corpus* matters now conferred on the Court of Appeal under the Habeas Corpus Act, section 8, with further appeal as of right by the person remanded into custody to the Court of Appeal.
17. Procedure on appeal to the Appellate Division of the High Court should be by way of a summary notice of motion, except where the appeal is from a judge at trial.
 18. There should not be monthly lists, but a running list to which cases can be added from day to day.
 19. Appeals should lie to the Court of Appeal from decisions of the Appellate Division of the High Court of Justice, with leave of the Court of Appeal.
 20. Appeals should lie to the Court of Appeal from:
 - (a) All final judgments of judges of the High Court of Justice;
 - (b) Final judgments of the surrogate courts and county and district courts where the judgment is one that would be within the alternative jurisdiction of the Supreme Court;
 - (c) The Lands Tribunal;
 - (d) Judgments of the Appellate Division of the High Court, with leave of the Court of Appeal, where in the opinion of the Court of Appeal important questions of law are involved.³⁵

³⁵As to appeals by the Attorney General in summary conviction matters, see p. 794 *infra*.

APPENDIX

A

**Appellate Jurisdiction Exercised Under Special Statutes
by the County and District Court, or a Judge Thereof**

NOTE: The following provincial statutes specially provide for appeals to the county and district court or to a judge thereof. These statutes are in addition to, and do not include, the jurisdiction under section 17 of the Summary Convictions Act, the ordinary civil jurisdiction of the county or district court under the County Courts Act, and other acts constituting courts.

The Air Pollution Control Act, R.S.O. 1960, c.12, ss.4 (2), 7 (5). (See also the Air Pollution Control Act, 1967, which partially repeals the above.)

The Child Welfare Act, Ont. 1965, c.14, ss.36, 64.

The Corporations Act, R.S.O. 1960, c.71, s.12.

The Costs of Distress Act, R.S.O. 1960, c.74, s.6 (5).

The Crown Timber Act, R.S.O. 1960, c.83, s.23.

The Department of Municipal Affairs Act, R.S.O. 1960, c.98, s.55 (3).

The Drainage Act, Ont. 1962-63, c.39, ss.19 (5), 23 (3), 32 (1).

The Employment Agencies Act, R.S.O. 1960, c.121, s.6 (3).

The Fire Marshals Act, R.S.O. 1960, c.148, s.19, as amended by Ont. 1960-61, c.29, s.1.

The Haliburton Act, R.S.O. 1960, c.170, s.13.

The Highway Improvement Act, R.S.O. 1960, c.171, s.96 (4).

The Highway Traffic Act, R.S.O. 1960, c.172, s.25b, as enacted by Ont. 1965, c.46, s.5.

The Hotel Fire Safety Act, R.S.O. 1960, c.179, s.23 as amended by Ont. 1960-61, c.36, s.1.

The Lightning Rods Act, R.S.O. 1960, c.213, s.6.

The Line Fences Act, R.S.O. 1960, c.216, s.11.

The Liquor Control Act, R.S.O. 1960, c.217, s.55a, as enacted by Ont. 1965, c.58, s.33; s.100, as re-enacted by Ont. 1965, c.58, s.61; s.140, as amended by Ont. 1965, c.58, s.77.

The Liquor Licence Act, R.S.O. 1960, c.218, s.43a as enacted by Ont. 1961-62, c.73, s.6.

The Local Improvement Act, R.S.O. 1960, c.223, s.36.

The Municipal Act, R.S.O. 1960, c.249, s.58.

The Ophthalmic Dispensers Act, Ont. 1960-61, c.72, s.16.

The Power Commission Act, R.S.O. 1960, c.300, s.33.

The Provincial Land Tax Act, Ont. 1961-62, c.111, s.16.

The Public Authorities Protection Act, R.S.O. 1960, c.318, s.4.

The Public Health Act, R.S.O. 1960, c.321, s.32.

- The Public Schools Act, R.S.O. 1960, c.330, s.58 (13) .
 The Radiological Technicians Act, Ont. 1962-63, c.122, s.11.
 The Secondary Schools and Boards of Education Act, R.S.O. 1960, c.362, s.6 as amended by Ont. 1961-62, c.131, s.1.
 The Separate Schools Act, R.S.O. 1960, c.368, s.49, as re-enacted by Ont. 1962-63, c.132, s.8 and as amended by Ont. 1964, c.108, s.7.
 The Snow Roads and Fences Act, R.S.O. 1960, c.376, s.11.
 The Training Schools Act, Ont. 1965, c.132, ss.13, 17.
 The Voters' Lists Act, R.S.O. 1960, c.420, s.14.

APPENDIX

B

Appellate Jurisdiction Exercised Under Special Statutes by a Single Judge of the Supreme Court, or the Supreme Court, or a Local Judge of the Supreme Court

NOTE: The following provincial statutes specially provide for appeals to the Supreme Court or to judges thereof. These statutes are in addition to, and do not include, jurisdiction under section 5 of the Summary Convictions Act, the ordinary civil jurisdiction of the Supreme Court under the Judicature Act, and other acts constituting courts.

- The Arbitrations Act, R.S.O. 1960, c.18, ss.16, 22, 26.
 The Boundaries Act, R.S.O. 1960, c.38, s.12 (3) , as re-enacted by Ont. 1961-62, c.9, s.4, and s.13.
 The Certification of Titles Act, R.S.O. 1960, c.48, ss.9, 16.
 The Collection Agencies Act, R.S.O. 1960, c.58, s.23d, as enacted by Ont. 1964, c.7, s.9.
 The Consumer Protection Act, Ont. 1966, c.23, s.12.
 The Corporations Act, R.S.O. 1960, c.71, s.12.
 The Corporations Tax Act, R.S.O. 1960, c.73, s.80.
 The Dower Act, R.S.O. 1960, c.113, s.31.
 The Embalmers & Funeral Directors Act, R.S.O. 1960, c.120, s.16 (5) .
 The Income Tax Act, Ont. 1961-62, c.60, s.19 (1) .
 The Insurance Act, R.S.O. 1960, c.190, s.60.
 The Land Titles Act, R.S.O. 1960, c.204, s.162 (3) , as re-enacted by Ont. 1966, c.77, s.22; s.8 (8) , as enacted by Ont. 1961-62, c.70, s.5 (2) ; s.29, as re-enacted by Ont. 1966, c.77, s.12; and ss.23, 31, 46, 48, 169, 179.
 The Libel and Slander Act, R.S.O. 1960, c.211, s.13.

- The Liquor Licence Act, R.S.O. 1960, c.218, s.20, as amended by Ont. 1961-62, c.73, s.1.
- The Logging Tax Act, R.S.O. 1960, c.224, s.21.
- The Mechanics' Lien Act, R.S.O. 1960, c.233, s.40.
- The Medical Act, R.S.O. 1960, c.234, s.41, as re-enacted by Ont. 1966, c.85, s.7.
- The Motor Vehicle Accident Claims Act, Ont. 1961-62, c.84, s.6.
- The Municipal Act, R.S.O. 1960, c.249, ss.170, 247 (9).
- The Nurses Act, Ont. 1961-62, c.90, s.11.
- The Optometry Act, Ont. 1961-62, c.101, s.11.
- The Private Hospitals Act, R.S.O. 1960, c.305, s.9a, as enacted by Ont. 1962-63, c.107, s.5.
- The Professional Engineers Act, R.S.O. 1960, c.309, s.26.
- The Psychologists Registration Act, R.S.O. 1960, c.316, s.9.
- The Public Accountancy Act, R.S.O. 1960, c.317, s.22.
- The Public Authorities Protection Act, R.S.O. 1960, c.318, s.4.
- The Quieting Titles Act, R.S.O. 1960, c.340, s.33.
- The Registry Act, R.S.O. 1960, c.348, s.104.
- The Retail Sales Tax Act, Ont. 1960-61, c.91, s.18.
- The Succession Duty Act, R.S.O. 1960, c.386, s.34.
- The Surveyors Act, R.S.O. 1960, c.389, s.36.
- The Training Schools Act, Ont. 1965, c.132, s.13.

APPENDIX

C

Appellate Jurisdiction Exercised Under Special Statutes by the Court of Appeal for Ontario or a Judge thereof

NOTE: The following provincial statutes specially provide for appeals to the Court of Appeal or to a judge thereof. These statutes are in addition to, and do not include, the ordinary civil jurisdiction of the Court of Appeal under the Judicature Act, Judges' Orders Enforcement Act, nor its general jurisdiction to hear appeals from inferior courts under the various statutes creating those courts, for example, the County Courts Act, the Division Courts Act, the Surrogate Courts Act. Nor does this list include the appellate criminal jurisdiction of the Court of Appeal under the Summary Convictions Act and the numerous provincial

statutes which make that Act applicable to prosecutions thereunder. In addition, the Court of Appeal also has jurisdiction under federal statutes including, in particular, the Criminal Code.

Absentees Act, R.S.O. 1960, c.2, s.2 (3) .

Approved Impartial Referees and Arbitrators Act, Ont. 1961-62, c.5, s.5 (3) .

Arbitrations Act, R.S.O. 1960, c.18, s.16.

Architects Act, R.S.O. 1960, c.20, s.21.

Child Welfare Act, Ont. 1965, c.14, ss.36, 64.

Collection Agencies Act, R.S.O. 1960, c.58, s.26, as re-enacted by Ont. 1964, c.7, s.11.

Conservation Authorities Act, R.S.O. 1960, c.62, ss.25 (10) , 28 (8) .

Constitutional Questions Act, R.S.O. 1960, c.64, s.6.

Controverted Elections Act, R.S.O. 1960, c.65, ss.58, 60; R.R.O. 1960, Reg. 56, s.58.

Conveyancing and Law of Property Act, R.S.O. 1960, c.66, ss.38, 62.

Corporations Act, R.S.O. 1960, c.71, s.338 and s.326 (1e) , as enacted by Ont. 1962-63, c.24, s.11.

Corporations Tax Act, R.S.O. 1960, c.73, s.84.

Creditors' Relief Act, R.S.O. 1960, c.78, s.38.

Credit Unions Act, R.S.O. 1960, c.79, s.52, as amended by Ont. 1964, c.14, s.12.

Dentistry Act, R.S.O. 1960, c.91, s.27, as re-enacted by Ont. 1966, c.38, s.14.

Dependants' Relief Act, R.S.O. 1960, c.104, s.12.

Drainage Act, Ont. 1962-63, c.39, s.83.

Election Act, R.S.O. 1960, c.118, s.133.

Expropriation Procedures Act, Ont. 1962-63, c.43, s.11 and s.1a, as enacted by Ont. 1966, c.53, s.1.

Fraudulent Debtors Arrest Act, R.S.O. 1960, c.155, s.24.

Gas and Oil Leases Act, Ont. 1962-63, c.49, s.7.

Habeas Corpus Act, R.S.O. 1960, c.169, s.8.

Highway Improvement Act, R.S.O. 1960, c.171, ss.34 (10) , 37 (6) , 93 (6) , 94 (7) , 96.

Income Tax Act, Ont. 1961-62, c.60, s.23.

Income Tax Agreement Act, Ont. 1962-63, c.62, s.1.

Infants Act, R.S.O. 1960, c.187, s.21.

Insurance Act, R.S.O. 1960, c.190, ss.12, 268, 338, 339.

Investment Contracts Act, R.S.O. 1960, c.194, s.15.

Juvenile and Family Courts Act, R.S.O. 1960, c. 201, s. 17.

Lakes and Rivers Improvement Act, R.S.O. 1960, c.203, s.100.

Landlord and Tenant Act, R.S.O. 1960, c.206, ss.72, 79.

Liquor Control Act, R.S.O. 1960, c.217, s.55a, as enacted by Ont. 1965, c.58, s.33; and ss.140, 141.

- Liquor Licence Act, R.S.O. 1960, c.218, s.43a, as enacted by Ont. 1961-62, c.73, s.6.
- Loan and Trust Corporations Act, R.S.O. 1960, c. 222, s.126.
- Local Improvement Act, R.S.O. 1960, c.223, ss.51 (4) , 60.
- Logging Tax Act, R.S.O. 1960, c.224, s.21.
- Married Women's Property Act, R.S.O. 1960, c.229, s.12.
- Matrimonial Causes Act, R.S.O. 1960, c.232, ss.6, 7.
- Mechanics' Lien Act, R.S.O. 1960, c.233, ss.39, 40.
- Medical Act, R.S.O. 1960, c.234, s.35; s.40a, as enacted by Ont. 1966, c. 85, s.6 and s.41, as re-enacted by Ont. 1966, c.85, s.7.
- Mental Incompetency Act, R.S.O. 1960, c.237, ss.5, 9.
- Mining Act, R.S.O. 1960, c.241, ss.98, 155.
- Mining Tax Act, R.S.O. 1960, c.242, ss.10 (8) , 28 (2) .
- Mortgage Brokers Registration Act, R.S.O. 1960, c.244, s.11a, as enacted by Ont. 1964, c.63, s.7.
- Mortgages Act, R.S.O. 1960, c.245, s.10.
- Mortmain & Charitable Uses Act, R.S.O. 1960, c.246, s.14.
- Motor Vehicle Accident Claims Act, Ont. 1961-62, c.84, s.26.
- Municipal Act, R.S.O. 1960, c.249, ss.346, 431, 347 (2) .
- Municipal Arbitrations Act, R.S.O. 1960, c.250, s.7.
- Municipal Franchises Act, R.S.O. 1960, c.255, s.10.
- Municipality of Metropolitan Toronto Act, R.S.O. 1960, c.260, s.98.
- Ontario Energy Board Act, Ont. 1964, c.74, ss.21, 31, 32, 41.
- Ontario Highway Transport Board Act, R.S.O. 1960, c.273, ss.19, 21.
- Ontario Municipal Board Act, R.S.O. 1960, c.274, s.93, 95.
- Partition Act, R.S.O. 1960, c.287, s.9.
- Pension Benefits Act, Ont. 1965, c.96, ss.23, 24.
- Pharmacy Act, R.S.O. 1960, c.295, s.51.
- Police Act, R.S.O. 1960, c.298, s.48a (6) (10) , as enacted by Ont. 1964, c.92, s.17.
- Power Commission Act, R.S.O. 1960, c.300, ss.33, 34, 42.
- Prepaid Hospital & Medical Services Act, R.S.O. 1960, c.304, s.11.
- Private Investigators and Security Guards Act, Ont. 1965, c.102, s.21.
- Professional Engineers Act, R.S.O. 1960, c.309, s.28.
- Public Inquiries Act, R.S.O. 1960, c.323, s.5.
- Public Works Act, R.S.O. 1960, c.338, s.31.
- Quieting Titles Act, R.S.O. 1960, c.340, s.34.
- Real Estate and Business Brokers Act, R.S.O. 1960, c.344, s.32., as re-enacted by Ont. 1964, c.99, s.12; s.54h, as enacted by Ont. 1962-63, c.123, s.24.
- Retail Sales Tax Act, Ont. 1960-61, c.91, s.22.
- Registry Act, R.S.O. 1960, c.348, s.91 (3) and s.94a (9) , as enacted by Ont. 1964, c.102, s.27.
- Schools Administration Act, R.S.O. 1960, c.361, ss.18, 69.

Securities Act, Ont. 1966, c.142, ss.29, 89, 112, 114.
 Succession Duty Act, R.S.O. 1960, c.386, s.34.
 Surveyors Act, R.S.O. 1960, c.389, s.36.
 Telephone Act, R.S.O. 1960, c.394, ss.17, 19.
 Training Schools Act, Ont. 1965, c.132, s.18.
 Unconscionable Transactions Relief Act, R.S.O. 1960, c.410, s.4.
 Used Car Dealers Act, Ont. 1964, c.121, s.17; s.18a, as enacted by Ont. 1965, c.139, s.1.
 Vendors and Purchasers Act, R.S.O. 1960, c.414, s.3, as amended by Ont. 1960-61, c.101, s.1.
 Veterinarians Act, R.S.O. 1960, c.416, s.14.
 Voters' Lists Act, R.S.O. 1960, c.420, s.39.

APPENDIX

D

Provincial Statutes Providing for Appeals by way of a Stated Case

<u>TO SUPREME COURT</u>	<u>TO COURT OF APPEAL</u>
The Arbitrations Act, R.S.O. 1960, c.18, s.26.	The Controverted Elections Act, R.S.O. 1960, c.65, s.58.
The Land Titles Act, R.S.O. 1960, c.204, ss.23, 48.	The Mechanics' Lien Act, R.S.O. 1960, c.233, s.39.
The Liquor Licence Act, R.S.O. 1960, c.218, s.20, as amended by Ont. 1961-62, c.73, s.1.	The Ontario Energy Board Act, Ont. 1964, c.74, s.31.
The Summary Convictions Act, R.S.O. 1960, c.387, s.5—Judge of Supreme Court in chambers.	The Ontario Highway Transport Board Act, R.S.O. 1960, c.273, s.19.
	The Ontario Municipal Board Act, R.S.O. 1960, c.274, s.93.
	The Police Act, R.S.O. 1960, c.298, s.48a(6) as enacted by Ont. 1964, c.92, s.17.
	The Public Inquiries Act, R.S.O. 1960, c.323, s.5.
	The Telephone Act, R.S.O. 1960, c.394, s.17.
	The Voters' Lists Act, R.S.O. 1960, c.420, s.39.

Section 3

EXTRA-JUDICIAL EMPLOYMENT OF JUDICIAL PERSONNEL

INTRODUCTION

In this Section we deal with the employment of judges in services that are not strictly connected with their constitutional and statutory judicial functions. The subject will be considered in two parts:

1. The law relevant to the employment by governmental bodies or private individuals of judges for services that lie outside their judicial functions, and the payment of compensation therefor in addition to their judicial salaries and allowances.
2. The practice in Ontario of employing judicial officers to render extra-judicial services.

The Judges Act was amended in 1967,¹ altering and clarifying the Act as it existed prior to that date. We shall deal first with the law as it formerly was and the practices followed under it, and then discuss the effect that the amendments will have on future employment of judges to perform extra-judicial services.

¹Can. 1966-67, c. 76.

CHAPTER 45

The Law Respecting Extra-Judicial Employment of Judges

AN extensive practice has grown up in the Province of Ontario whereby judges and magistrates have either been required under statutory authority, or have been asked without statutory authority, to perform many duties which are in no way connected with or related to their judicial duties in the courts. These duties may be administrative, as in the fixing of assessments,¹ or legislative and administrative, for example, as members of licensing boards and boards of commissioners of police,² or of a strictly judicial character, as arbitrators,³ or the duties may be a combination of all three.

The employment of judges to perform duties other than their ordinary duties in the courts has great relevance to the matters under consideration by this Commission. If judges are unavailable for their ordinary judicial duties the courts will not perform their full functions to protect and safeguard the rights of the individual. In addition, not only has the propriety of judges and magistrates being engaged in these extra-judicial functions been called in question in representations that have been made to the Commission, but the legality of judges' accepting remuneration other than their judicial

¹Assessment Act, R.S.O. 1960, c. 23, s. 75.

²Police Act, R.S.O. 1960, c. 298, s. 7(2).

³Lakes and Rivers Improvement Act, R.S.O. 1960, c. 203, s. 4.

salaries for any services rendered to the Government of Canada, the provincial government, municipalities or private individuals, has been raised with great force.

In addition to specific statutory duties, judges are frequently asked to conduct Royal Commissions and judicial investigations for which they are, in some cases, invited on behalf of the province or a municipality to accept remuneration for the services rendered, in addition to their out-of-pocket expenses and reasonable living allowances.

Whatever may have been the practice in earlier years, it has now been settled by the judges of the Supreme Court of Ontario and by some of the county court judges that it is inconsistent with the provisions of the Judges Act to accept any remuneration for any services they may be called upon to render, over and above their judicial salaries and allowances, as fixed by statute, together with reasonable transportation and living expenses. Many judges taking this view have rendered great public service as Royal Commissioners, or by presiding over judicial inquiries without any remuneration other than the statutory salaries and allowances paid to all other judges.

The law applicable to the employment of judges to render extra-judicial services is quite distinct from the law applicable to magistrates. The problem as related to magistrates is discussed elsewhere in this Report.

The constitutional provisions of sections 96, 99 and 100 of The British North America Act are the foundation of an independent judiciary throughout Canada. They read as follows:

“96. The Governor-General shall appoint the judges of the superior, district and county courts in each province except those of the courts of probate in Nova Scotia and New Brunswick.

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or

upon the coming into force of this section if at that time he has already attained that age.⁴

100. The salaries, allowances and pensions of the judges of the superior, district and county courts (except the courts of probate in Nova Scotia and New Brunswick), and of the admiralty courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada."

Constitutionally the Governor General acting on behalf of the Sovereign, with the advice of the Cabinet, appoints all superior and county and district court judges. Their salaries and allowances are fixed by the Parliament of Canada. It does not lie within the power of the Government of Canada, nor of any province, by order in council to add to or subtract from the salaries and allowances as fixed by Parliament.

Public debate in the Parliament of Canada is the safeguard that the members of the public have for the security of an independent judiciary.

Since 1867 Parliament has fixed the salaries of all judges and provided the system by which their living allowances and expenses shall be paid. The salaries of the superior and county court judges were revised by Parliament in 1963,⁵ and again in 1967.⁶

In the provinces, prior to March 1, 1967, the chief justices received a salary of \$25,000 a year, and the other judges of the Supreme Court, \$21,000 a year. The county court and district court judges received \$16,000 a year. These salaries were increased in 1967 to \$30,000, \$26,000, and \$19,000, respectively, with some additional salary in certain circumstances which are discussed later in this chapter.

The allowances for living and travelling expenses of judges were fixed in 1960,⁷ as were the actual out-of-pocket expenses.

⁴B.N.A. Act, s. 99(2), as amended by Can. 1960, c. 2, s. 1. County court judges retire at 75: Judges Act, R.S.C. 1952, c. 159, s. 26, as re-enacted by Can. 1966-67, c. 76, s. 3.

⁵Judges Act, R.S.C. 1952, c. 159, s. 7, as amended by Can. 1963, c. 8, ss. 1, 2; and s. 19, as amended by Can. 1963, c. 8, s. 5.

⁶*Ibid.*, s. 7, as amended by Can. 1966-67, c. 76, s. 1(1); and s. 19, as amended by Can. 1966-67, c. 76, s. 1(2).

⁷*Ibid.*, s. 21, as amended by Can. 1960, c. 46, s. 2.

Unless otherwise indicated, in dealing with the law and the practices prior to the several amendments of 1967, we shall use the present tense.

The Judges Act⁸ provides a statutory code governing the right of a judge to engage in extra-judicial employment, and the right of a judge to receive remuneration in excess of the salary expressly provided by Parliament. The relevant sections prior to the 1967 amendment read:

“EXTRA-JUDICIAL EMPLOYMENT

37. No judge shall, either directly or indirectly, as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties, but every judge shall devote himself exclusively to his judicial duties, except that a District Judge in Admiralty may continue to perform the duties of a public office under Her Majesty in right of Canada or of a province held by him at the time of his appointment as District Judge in Admiralty.

38. (1) Except as provided in subsection (2), no judge shall act as commissioner or arbitrator on any commission or inquiry without the consent of the Governor in Council.

(2) Every judge nominated for the purpose by the Governor in Council or the Lieutenant-Governor in Council may act as commissioner or arbitrator on any commission, inquiry or arbitration for which he may be appointed under any authority in that behalf exercisable by the Governor in Council or the Lieutenant-Governor in Council respectively.

(3) Subsection (1) does not apply to judges acting as arbitrators or assessors of compensation or damages under the Railway Act or any other public Act, whether of general or local application, of the Dominion or of any province, whereby a judge is required or authorized without authority from the Governor in Council or Lieutenant-Governor in Council to assess or ascertain compensation or damages.

NO EXTRA REMUNERATION

39. (1) Except as provided in subsection (3), no judge shall receive any remuneration in addition to his judicial salary for acting as commissioner or arbitrator or for acting as administrator or deputy of the Governor General or for any duty or service, whether judicial or executive, that he may

⁸R.S.C. 1952, c. 159 and amendments.

be required to perform for or on behalf of the Government of Canada or the government of any province.

(2) Subsection (1) does not affect the right of any judge to receive remuneration under the provisions of any Dominion or provincial statute in force on the 1st day of July, 1920.

(3) A judge acting as commissioner or arbitrator pursuant to subsection (2) of section 38, or as administrator or deputy of the Governor General or performing any duty or service he is required to perform for or on behalf of the Government of Canada or the government of any province, may receive, in addition to his judicial salary, such moving or transportation expenses and living allowance as the Governor in Council or the Lieutenant-Governor in Council, as the case may be, may fix by general or special order."

As we shall be discussing the 1967 amendments later, it is useful to now set out those sections as amended, that will have to be considered.

"20. (1) There shall be paid to every judge who is in receipt of a salary under this Act, other than a judge of the Territorial Court of the Yukon Territory or the Northwest Territories, an additional salary of \$2,000.00 per annum as compensation for any extra-judicial services that he may be called upon to perform by the Government of Canada or the government of a province, and for the incidental expenditures that the fit and proper execution of his office as judge may require.⁹

21. (1) Subject as in this section provided, a judge of a superior or county court or a District Judge in Admiralty of the Exchequer Court who for the purpose of performing any function or duty as such judge attends at any place other than that at which or in the immediate vicinity of which he is by law obliged to reside is entitled to be paid, as a travelling allowance,

- (a) his moving or transportation expenses; and
- (b) reasonable travelling and other expenses incurred by him in so attending.

(2) No judge is entitled to be paid travelling allowance for attending at or in the immediate vicinity of the place where he resides.

(3) No judge of a county court is entitled to be paid travelling allowance for attending at the county town of the

⁹*Ibid.*, s. 20(1), as re-enacted by Can. 1966-67, c. 76, s. 1(2).

county within which he resides or at the judicial centre or district town of the judicial district or circuit to which he is appointed or assigned.

(8) No judge of a district court in Ontario is entitled to be paid any travelling allowance under subsection (1) for attending at a place within the district for which he was appointed but every such judge is entitled to be paid a travelling allowance of five hundred dollars per annum for such attendance.¹⁰

38. (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of the Parliament of Canada expressly authorized so to act or he is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or he is thereunto appointed or so authorized by the Lieutenant-Governor in Council of the province.¹¹

39. (1) Except as provided in subsection (3), no judge shall accept any salary, fee, remuneration or other emolument or any expenses or allowances for acting in any capacity described in subsection (1) of section 38 or as administrator or deputy of the Governor General or for performing any duty or service, whether judicial or executive, that he may be required to perform for or on behalf of the Government of Canada or the government of a province."¹²

The provisions of sections 37, 38 and 39, prior to the recent amendment, had been in substantially the same form since 1920.¹³

These sections must be read as part of the constitutional scheme providing for judicial independence.

Section 37 is a statutory prohibition against a judge's engaging in any occupation or business other than his judicial duties, unless some authority or permission to do so can be

¹⁰*Ibid.*, s. 21, as re-enacted by Can. 1966-67, c. 76, s. 2.

¹¹*Ibid.*, s. 38(1), as re-enacted by Can. 1966-67, c. 76, s. 5; s. 38(3) was unaltered by the 1967 amendments.

¹²*Ibid.*, s. 39(1), as re-enacted by Can. 1966-67, c. 76, s. 6(1).

¹³Can. 1920, c. 56, s. 12.

found elsewhere in the Act. This view of the section is reinforced by the exception contained in it. A district judge in admiralty is permitted to continue to perform the duties of a public office under Her Majesty in right of Canada, or a province, if he held that office at the time of his appointment as district judge in admiralty. For example, the exception would permit the Registrar of the Supreme Court of Ontario, if otherwise qualified, to accept an appointment as a district judge in admiralty and continue to act as Registrar of the Supreme Court. The fact that this exception was made emphasized the broad and comprehensive intention of the prohibition contained in section 37.

Section 38 deals specifically with the right of judges to act as commissioners or arbitrators on commissions or inquiries. Subsection (1) is a prohibition against judges' acting as commissioners, or arbitrators on commissions or inquiries, unless the consent of the Governor General is first obtained, or unless the provisions of subsection (2) are complied with. It is to be observed that the consent provided for under subsection (1) is a consent limited to the giving of authority to act as a commissioner or arbitrator on a commission or inquiry. Subsection (2), however, provides the exception to the broad prohibition of subsection (1). This subsection may be broken down into its constituent parts to indicate the circumstances in which a judge may act as a commissioner or arbitrator:

1. He must be nominated for the purpose by the Governor in Council or the Lieutenant Governor in Council.

2. The commission, inquiry or arbitration must be one to which he may be appointed under a statute which gives authority to the Governor in Council or the Lieutenant Governor in Council to appoint a commissioner or arbitrator.

It therefore follows that when, under this subsection, a statutory authority is conferred on the Governor in Council or the Lieutenant Governor in Council to appoint a commissioner or an arbitrator, a judge may be appointed to act as a commissioner or an arbitrator.

Subsection (3) of section 38 provides a further exception to subsection (1). If a *judge* is required or authorized to

assess compensation or damages under any act of Canada, or of a province, without the consent of the Governor in Council or the Lieutenant Governor in Council, he may ascertain compensation or assess damages. This section would apply to those statutes that expressly provide that compensation or damages are to be ascertained by a judge. It does not apply to a statute that merely provides that compensation or damages are to be fixed by arbitration. In addition, this subsection is limited to the fixing of compensation or the assessment of damages. It would have no application to the settlement of any other matters of dispute, even though a statute provided that they were to be settled by a judge acting as a Commissioner or arbitrator.

The provisions of sections 37 and 38 may be summed up as follows. There is a general legislative scheme, which, in effect, constitutes a declaration of principle that a judge should devote himself exclusively to his judicial duties. The obvious purpose of the scheme is to keep the judicial office independent and to make judges available to carry on the business of the courts so that trials, be they civil or criminal, will be dealt with expeditiously.

There is, however, a recognition that there are other duties that judges may be suitable to perform under certain circumstances. These duties are of a very restricted nature, that is, to act as commissioners, to conduct judicial inquiries, or to act as arbitrators, to fix compensation or assess damages. But in such cases, judges must be appointed by order in council, unless there is a statute requiring the judge to fix the compensation or assess the damages. Up to 1967 these were the only cases in which a judge might lawfully engage in activities other than his judicial duties of administering justice in the courts. These matters will be discussed with further application when considering some of the statute law of Ontario.

NO EXTRA REMUNERATION FOR JUDGES

Of equal importance to the restrictions placed on judges' accepting appointments to perform "extra-judicial services" are the prohibitions contained in section 39 of the Judges

Act, against judges' receiving extra remuneration for those services that they are permitted to render under the exceptions provided under sections 37 and 38.

Subsection (1) of section 39 is a clear, unequivocal prohibition against a judge's receiving any remuneration in addition to his judicial salary for any duty or service rendered, whether it be a judicial, executive, or an administrative duty that he may be required to perform for, or on behalf of, the Government of Canada or the government of any province. This is a broad comprehensive provision obviously intended to prevent judges from being induced to divert themselves from their ordinary judicial duties to render other services, for which there might be some hope of material reward.

Subsection (3) re-emphasizes the prohibition contained in subsection (1) by providing that judges who are called upon to perform statutory duties as commissioners or arbitrators, to fix compensation or assess damages, *may receive in addition to their judicial salaries* "such moving or transportation expenses and living allowance as the Governor in Council or the Lieutenant Governor in Council, as the case may be, may fix by general or special order". This provision is obviously intended to provide for payment of necessary out-of-pocket expenses and it is *not* intended to be used for the purpose of providing remuneration by allowing an excessive living allowance.

There is, however, one exception to the prohibitions contained in subsection (1), and that is contained in subsection (2). Where a judge had a right to receive remuneration under the provisions of a Dominion or provincial statute in force prior to July 1, 1920, that right was preserved under the provisions of this subsection and continues to exist, unless it has been affected by subsequent Dominion or provincial legislation. Therefore one must look to the statute law as it existed prior to July 1, 1920, to ascertain a judge's right to receive remuneration under the provisions of any Dominion or provincial statutes, and to subsequent legislation to see how that right may have been affected.

ALLOWANCES TO SUPREME COURT JUDGES

Since 1869 each judge of the Supreme Court of Ontario has had the right to receive \$1,000 per year for duties assigned to the judges by provincial statutes, "outside of litigious matters and the ordinary duties of the said judges".¹⁴ The form in which the statutory provisions have been worded has varied from time to time. In 1910 the previous statutes were repealed and the Extra-Judicial Services Act was passed. The relevant part reads as follows: "Every Judge of the Supreme Court shall be paid out of the Consolidated Revenue Fund the annual sum of one thousand dollars payable quarterly, as compensation for the services which he is called on to render by any Provincial legislation in addition to his ordinary duties."¹⁵ This created a right in all the judges of the Supreme Court to receive remuneration under a provincial statute, a right in effect as of July 1, 1920. It was therefore preserved by subsection (2) of section 39. In 1964 the amount of \$1,000 was increased to \$4,000.¹⁶ This legislation did not affect the right of any judge to receive remuneration; it merely increased the amount to be paid in acknowledgment of the right.

ALLOWANCES TO COUNTY COURT JUDGES FOR EXTRA-JUDICIAL SERVICES

Prior to July 1, 1920, the county court judges, who were also surrogate court judges and division court judges, had the right to receive remuneration under certain provincial statutes. No useful purpose will be served by going into a detailed survey of all the relevant legislation in view of the provisions of the current legislation. After Confederation, county court judges were allowed to collect surrogate court fees and fees as local masters and official referees under the Common Law Procedure Act.¹⁷ County court judges were paid on a fee basis for these services until 1881, when by

¹⁴See recital to Ont. 1893, c. 12.

¹⁵Extra-Judicial Services Act, Ont. 1910, c. 29, s. 2.

¹⁶Extra-Judicial Services Act, R.S.O. 1960, c. 128, s. 1, as amended by Ont. 1964, c. 29, s. 1.

¹⁷Common Law Procedures Act, Ont. 1867, c. 28, s. 9.

amendments to the Surrogate Courts Act and the Judicature Act, the Lieutenant Governor in Council was given power to commute the surrogate fees with the judge's consent, and the fees as local masters and official referees, with or without the judge's consent. In 1910 an allowance of \$500 per year payable to all district court judges was provided in lieu of surrogate court fees and fees under the Mechanics and Wage Earners Lien Act, the Woodmans Lien Act and the Rivers and Streams Act.¹⁸

In 1919 an amendment to the County Judges Act¹⁹ provided that all county and district court judges—with the exception of the judges of the Counties of York, Wentworth, Middlesex and Carleton, of the junior judges in other counties—were to receive an annual allowance of \$1000, payable monthly. The annual allowances of the judges of the excepted counties were fixed as follows:

The County of York:

the senior judge at \$2600
each junior judge at \$1600

The County of Wentworth:

the senior judge at \$1500
each junior judge at \$1000

The County of Middlesex:

the senior judge at \$1300
each junior judge at \$1000

The County of Carleton:

the senior judge at \$1300
each junior judge at \$1000

Each junior judge, other than in the Counties of York, Wentworth, Middlesex and Carleton, was entitled to receive the same amount of surplus surrogate fees as he would have been entitled to had the Act not been passed, and the same was payable out of monies appropriated by the Legislature

¹⁸County Judges Act, Ont. 1909, c. 29, s. 16a, as enacted by Ont. 1910, c. 26, s. 13.

¹⁹County Judges Act, 1919, Ont. 1919, c. 26, s. 5.

for commutation of fees of surrogate judges. The Act provided:

"5. (3) The said annual sums shall be in lieu of all fees and allowances payable to the judge of a county or district court for any services performed by him under any Act of this Legislature, including fees as Judge of the Surrogate Court and as a Local Master of the Supreme Court, and where such fees are payable by the parties to any proceedings before the judge, or upon any order or certificate made or given by him, they shall hereafter be payable in law stamps and shall form part of the Consolidated Revenue Fund, and except as hereinafter provided, the judge of a county or district court shall not be entitled to receive any fees whatever under any Act of this Legislature."²⁰

The exception provided read as follows:

"5. (4) Nothing in the foregoing subsections shall apply to or affect the payment of any allowance or fees to the judge of a county or district court with respect to any office which may be lawfully held by him in addition to his office as a judge, to which any annual allowance or salary may be attached, or in the performance of his duties as an arbitrator or referee under *The Municipal Act*, *The Public Works Act*, *The Ontario Railway Act*, *The Arbitration Act*, or any other statute designating him by his name of office as an arbitrator or referee."²¹

It is first to be observed that the exception only applies to offices that "may be lawfully held" by the judge. This provision is to be read with sections 37 and 38 of the Judges Act.

The effect of these exceptions with respect to judges other than the junior judges, mentioned in subsection 5, was to permit payment of an allowance to a county or district court judge, if he held an office to which an annual allowance or salary might be attached, or fees for the performance of his duties as an arbitrator or referee under (a) the Municipal Act, (b) the Public Works Act, (c) the Ontario Railway Act, (d) the Arbitration Act or (e) any other statutes designating him by his office as an arbitrator or an official referee. But these exceptions must come within the provisions of section

²⁰*Ibid.*, s. 5(3).

²¹*Ibid.*, s. 5(4).

38 of the Judges Act which permits a judge to act only as a commissioner or arbitrator on any commission or inquiry or arbitration for which he may be appointed under authority in that behalf, exercisable by the Governor in Council or the Lieutenant Governor in Council respectively, and that he must be nominated for that purpose by the Governor in Council or the Lieutenant Governor in Council and those cases where a judge is required or authorized by a statute of the Dominion or province to act as arbitrator or assessor of compensation or damages. Any other appointment of a judge would be unlawful.

There do not appear to be any payments made to county or district court judges under the County Judges Act, on the basis of an annual allowance or salary, which were authorized by statute prior to July 1, 1920, other than the possible exception of an allowance to a judge as a member of a board of commissioners of police of a city. The statutory provisions in this regard in force on the relevant date were contained in the Municipal Act.²² The council of every city might constitute a board of commissioners of police. The board, if constituted, would consist of the mayor, a judge of the county or district court and the police magistrate. The council was given power to provide for reasonable remuneration for the services of the judge as a member of the board. It can hardly be said that under these provisions an annual allowance or a salary was attached to the office. It was open to the council to provide for remuneration according to meetings attended, or from month to month.

Since July 1, 1920, the province has from time to time altered the amount of the remuneration to county and district court judges for services performed under the Surrogate Courts Act and other statutes. The law, as it formerly was, read as follows:

- “9. (1) There shall be paid,
- (a) to the chief judge an allowance at the rate of \$7,000 per annum;
 - (b) to the judge of the county of York, an allowance at the rate of \$4,500 per annum;

²²Municipal Act, Ont. 1913, c. 43, s. 354(7).

(c) to the judge of every other county and district court, to every junior judge of a county or district court, and to every judge for the county and district courts of the counties and districts of Ontario, an allowance at the rate of \$3,500 per annum.

(2) The allowances under subsection 1 are payable monthly out of the Consolidated Revenue Fund.

(3) Such sums are in lieu of all fees and allowances payable to the judge of a county or district court for any services performed by him under any Act of the Legislature, including fees as judge of the surrogate court and as local master of the Supreme Court, and where such fees are payable by the parties to a proceeding before the judge, or upon an order or certificate made or given by him, they shall form part of the Consolidated Revenue Fund, and, except as hereinafter provided, a judge of a county or district court is not entitled to receive any fees whatever under any Act of the Legislature.

(4) Nothing in this section applies to or affects the payment of any allowance or fees to a judge of a county or district court with respect to any office that may be lawfully held by him in addition to his office as judge to which an annual allowance or salary is attached or in the performance of his duties as an arbitrator or referee under any statute designating him by his name of office as an arbitrator or referee.”²³

These provisions read with sections 37, 38 and 39 of the Judges Act require us first to ascertain what offices may be “lawfully held” by a judge in addition to his office as judge, to which an annual allowance or salary is attached, and what duties as an arbitrator or referee a judge is permitted to perform.

The only duties in addition to his ordinary judicial duties that a judge is permitted to perform under the provisions of the Judges Act, are (1) to act as a commissioner or an arbitrator if he is appointed by the Governor in Council or the Lieutenant Governor in Council, and (2) to act as arbitrator to assess and ascertain compensation or damages under a statute. But there are limits on the provincial power. Even where there is power to appoint an arbitrator or a commis-

²³County Judges Act, R.S.O. 1960, c. 77, s. 9, as amended by Ont. 1962-63, c. 28, s. 1(1) which deleted s. 9(3)(4). In 1967, s. 9(1)(2) became s. 8(4) of the Surrogate Courts Act, R.S.O. 1960, c. 388: see Ont. 1967, c. 17, s. 2 and Ont. 1967, c. 97, s. 1.

sioner, the right of a judge to receive remuneration, in addition to his out-of-pocket expenses, is limited to those cases in which that right existed under a Dominion or provincial statute in force on the first of July, 1920. It does not lie within the power of the provincial government to make exceptions to the prohibitions contained in the Judges Act, nor does it lie within the power of the provincial government to create new rights for judges to receive other remunerations than those provided by the Judges Act, other than the rights that existed on July 1, 1920. The Provincial Legislature may, however, increase or alter the amount of the remuneration paid pursuant to the preserved right to receive it. This the Provincial Legislature has done with respect to the amounts paid to the Supreme Court judges and the county and district court judges with respect to extra-judicial services, under the provision of provincial statutes in force on July 1, 1920. These amounts were payable to all judges alike, and there would not appear to be any contravention of the provisions of the Judges Act by the Province in paying, nor by the judges in receiving, these amounts from the Province.

1967 AMENDMENT

We now consider the effect of the 1967 amendments to the Judges Act. Section 20 is new. Certain provinces in Canada have made a statutory allowance for judges for extra-judicial services. As we have seen, the allowance in Ontario is \$4,000 for Supreme Court Judges, and \$3,500 for county and district court judges. Under section 20 the judges of the provinces are to be paid \$2,000 per annum by the Government of Canada for any extra-judicial services that they may be called upon to perform by the Government of Canada, or the government of a province, and for the incidental expenditures that the fit and proper execution of the office of a judge may require. However, this allowance is not payable to "a judge who receives from a province any annual or other periodic compensation as judge of a superior or county court".²⁴ Under section 19 of the Act

²⁴Judges Act, R.S.C. 1952, c. 159, s. 20(2)(a), as enacted by Can. 1966-67, c. 76, s. 1(2).

fixing the judicial salaries, section 20, and the relevant sections dealing with expense allowances, Parliament has assumed its full duty under section 100 of the B.N.A. Act of fixing and providing "the salaries, allowances . . . of the judges of the superior, district and county courts. . . ."

We now deal with those sections in the amendments of 1967 defining the extra-judicial activities in which a judge may now engage. Section 37 remains unchanged and what we have said to have applied in the past, applies with equal force for the future. A judge is required "to devote himself exclusively to his judicial duties". However, sections 38 and 39 qualify these provisions. A judge may now act and may only act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission, inquiry or other proceedings, if he is expressly authorized so to do by an act of the Parliament of Canada, or of a provincial legislature, or if "he is thereunto appointed or so authorized by the Governor General or by the Lieutenant Governor in Council" in cases or matters within the respective jurisdictions of Canada and the provinces. To a limited extent, the amendment of 1967 has expanded the classes of matters in which a judge may lawfully act.

Previously, as we have pointed out, a judge could only act as "a commissioner or arbitrator" on any commission or inquiry if authorized to do so by order in council. Now, under the amendment, a judge may in addition act as an adjudicator, referee, conciliator or mediator on any commission, any inquiry or other proceedings. Previously, a judge was only authorized to act if authorized by an order in council. Under the amendment he may, in addition, now act in the designated capacities, if expressly authorized by an act of Parliament or of the Legislature. Subsection (3) of section 38 remains unchanged, that is, the prohibitions with which we have just been dealing do not apply to judges acting as arbitrators or assessors of compensation or of damages under the Railway Act, or any other public act "whereby a judge is required or authorized without authority from the Governor in Council or the Lieutenant Governor in Council to assess compensation or damages".

How do the 1967 amendments affect the right to receive remuneration for extra-judicial activities? Section 39 has the significant marginal note of "no extra remuneration". All of section 39 of the previous legislation was repealed, but subsection (2) was re-enacted in precisely the same language.²⁵ It preserves the right of a judge to receive remuneration under any statute of Canada or of a province, in force on July 1, 1920. For convenience we repeat the new section 39 (1):

"39. (1) Except as provided in subsection (3), no judge shall accept any salary, fee, remuneration or other emolument or any expenses or allowances for acting in any capacity described in subsection (1) of section 38 or as administrator or deputy of the Governor General or for performing any duty or service, whether judicial or executive, that he may be required to perform for or on behalf of the Government of Canada or the government of a province."

The words used in section 39 (1), as it was before the amendment, were: "... no judge shall *receive* any remuneration in addition to his judicial salary. . . ." In the amendment the prohibition is much more explicit. The words are "... no judge shall *accept* any salary, fee, remuneration or other emolument or any expenses or allowances for acting in any capacity described in subsection (1) of section 38 . . .". Section 38 (1) defines comprehensively the extra-judicial services that a judge may render, and section 39 (1) is a complete prohibition against accepting any compensation in any form, whether it be fees, allowances or expenses, unless they come within the exceptions set out in the Act.

We have dealt with the first exception, that is, the exception provided by subsection (2). The second is the provision for expenses. If a judge renders authorized extra-judicial services in any capacity described in subsection (1) of section 38, he may receive "his moving or transportation expenses and reasonable travelling and other expenses incurred by him away from his ordinary place of residence . . . in the same amount and under the same conditions as if he were performing a function or duty as such judge . . .".

We first have the express prohibition contained in section

²⁵We have discussed this subsection fully in pp. 689ff. *supra*.

39 (1) and the exception. The exception would, therefore, be strictly construed. The allowances fixed by Parliament which a judge may accept when carrying out his ordinary duties, are set out in the statute and must be reasonable out-of-pocket expenses only. This statute does not permit the past practice of fixing a living allowance by order in council, which may be paid to a judge whether he is at home or away from his home. The other exception is contained in the last subsection of section 39 (No. 2 obviously is a misprint for 4). It reads: "This section does not apply in any case where a judge was appointed commissioner, arbitrator, adjudicator, referee, conciliator or mediator before the coming into force of this section." This appears to have been intended to be a bridge to avoid any retrospective effect to the amending statute. It would appear that the extra-judicial duties defined in this subsection will, in a short time, all have been performed.

The subsection only applies to judges who have been "appointed" to be commissioners, arbitrators, adjudicators, referees, conciliators or mediators before the coming into force of the section. It does not apply to judges who have held office, not by appointment, but under the authority of a statute applicable to their office. It would not appear that it was the intention of Parliament that judges who are members of boards of commissioners of police, or of boards of licensing commissioners, should be permitted to continue to accept additional remuneration for those services. They would not appear to be commissioners in the sense that the term commissioner is used throughout the Judges Act. A peculiar unintended result may follow with regard to arbitrators. Where, prior to the amendment, a judge was appointed by order in council to be official arbitrator under the Municipal Arbitrations Act, he would not appear to be bound by the provisions of section 39 of the Judges Act; but if a judge were to act as sole arbitrator when no official arbitrator had been appointed, he would appear to be bound by those provisions.

In the light of this analysis of the legal situation, it is now appropriate to consider the practice that has grown up in Ontario and which has given rise to much criticism.

CHAPTER 46

The Practice of Employing Judges to Render Extra-Judicial Services

THE practice of employing judges to render extra-judicial services, which has prevailed in Ontario in the past, has involved:

- (1) Payment of very considerable sums, principally to county and district court judges, for services rendered in offices created since July 1, 1920;
- (2) Payment to some judges by provincial and municipal authorities for services of a nature not contemplated on July 1, 1920, which services have been rendered on an *ad hoc* basis;
- (3) Payment to some judges individually for services rendered under provincial statutes, notwithstanding that annual allowances provided by the Province are stated to be "in lieu of all such fees and allowances";
- (4) Some judges' acting as municipal arbitrators and being paid to do so by the parties to the arbitration;
- (5) Some judges' acting as arbitrators in disputes arising out of collective bargaining agreements, and being paid for such services by the parties to the dispute;
- (6) Some judges' acting as conciliators in labour disputes on the appointment of the Minister of Labour, and being

paid living allowances far beyond their out-of-pocket expenses;

(7) Some judges' acting as chairmen of boards, such as the Liquor Licence Board and the Milk Industry Board.

PAYMENT OF ANNUAL ALLOWANCES OR SALARIES ATTACHED TO AN OFFICE WHICH MIGHT LAWFULLY HAVE BEEN HELD BY A JUDGE ON THE FIRST OF JULY, 1920

Apart from what we have stated, there do not appear to be any payments made to county or district court judges on the basis of an annual allowance or salary which were authorized prior to July 1, 1920, with the possible exception of those made to a judge as a member of a board of commissioners of police of a city. The statutory provision in this regard in force on the relevant date¹ empowered the council of every city to constitute a board of commissioners of police. The board, if constituted, consisted of a mayor, a judge of the county or district court, and the police magistrate. The council was given power to provide reasonable remuneration to the judge for his services as a member of the board. It could hardly be said that under these provisions an annual allowance or salary was attached to the office within the meaning of the Judges Act, as it was prior to the 1967 amendment.

Notwithstanding the provisions of the Judges Act, it is still mandatory that a county court judge be one of three members of a municipal board of commissioners of police.^{1a} The constitution of boards of commissioners of police has been discussed in this Report in another aspect.²

Quite apart from the propriety of judges' sitting on boards of commissioners of police, it is difficult to see how a judge could accept an appointment to such a board, having regard to the provisions of section 38 of the Judges Act. The office does not come within subsection (3) of section 38, as the judge is not acting as "an arbitrator or assessor of compensation or damages". The right to accept payment for the services performed would also appear to be prohibited by

¹ ¹Municipal Act, Ont. 1913, c. 43, s. 354(7).

^aPolice Act, R.S.O. 1960, c. 298, s. 7 (2).

²See Chapter 75 *infra*.

section 39 of the Judges Act, as this right was not one coming within subsection (2) of section 39. On July 1, 1920, it was not an office to which an annual salary was attached, nor was it "an office where duties as an arbitrator or referee" were to be performed.³

JUDGES ACTING AS JUVENILE AND FAMILY COURT JUDGES

In addition to annual payments for services rendered by judges as members of boards of commissioners of police, certain county and district court judges have received substantial amounts for acting as judges of juvenile and family courts, and some judges have been paid allowances as division court judges.

The table set out on the following three pages shows the total amounts paid to the respective county court judges for the year 1964,^{3a} as county and district court judges, juvenile and family court judges, division court judges and members of police commissions. The amounts shown under salary and provincial allowances include \$16,000 received during that year from the Government of Canada and \$3,500 from the provincial allowance made to county and district court judges. A further special allowance is made by the province to the Chief Judge of the County and District Courts.

It will be observed that certain county court judges receive only their judicial salaries and the judicial allowances provided by the province; others receive only these allowances together with division court fees, which are specially provided by the province. One county court judge, from the sources shown in this table, received \$3,358 more than the Chief Judge of the County and District Courts.

In addition to the amounts set out in the table, several of the county and district court judges have engaged in very remunerative activities as arbitrators, fixing compensation for land that has been expropriated, and acting as arbitrators or conciliators in labour disputes. Detailed information is not available on the earnings of the respective judges from all of these sources.

³County Judges Act, 1919, Ont. 1919, c. 26, c. 5(4).

^{3a}At the time of writing, the information as to later years was unavailable.

COUNTY AND DISTRICT COURT JUDGES Remuneration received as County, Division and Juvenile Court Judges, and as members of Police Commissions.

Note: The figure in brackets under heading, "Police Commission", indicates the number of commissions on which the County Court Judge is a member. The figure "\$500.00" under heading, "Division Court", refers to special allowance granted to District Court Judges pursuant to s.21(10), Judges Act.

<i>Judge</i>	<i>Jurisdiction</i>	<i>Salary and Prov. Allowance^a</i>		<i>Juvenile & Family Court</i>	<i>Division Court (fees)</i>	<i>Police Commission</i>	<i>TOTAL</i>
A. R. Willmott	CHIEF JUDGE	\$23,000.00		\$	\$		\$23,000.00
J. H. McDonald	Algoma	19,500.00			*500.00	1,300.00(4)	21,300.00
H. J. Reynolds	Algoma	19,500.00			*500.00		20,000.00
R. W. Reville	Brant	19,500.00				600.00(2)	20,100.00
P. S. MacKenzie	Bruce	19,500.00			234.00		19,734.00
P. J. Macdonald	Carleton	19,500.00				2,000.00(2)	21,500.00
C. C. Gibson	Carleton	19,500.00				300.00(1)	19,800.00
A. Richard	Carleton	19,500.00					19,500.00
A. E. Honeywell	Carleton	19,500.00					19,500.00
J. A. A. Duranceau	Cochrane	19,500.00			*500.00	450.00(2)	20,450.00
H. P. Cavers	Dufferin	19,500.00		500.00	54.00		20,054.00
J. F. McMillan	Elgin	19,500.00			135.00	300.00(1)	19,935.00
L. A. Deziel	Essex	19,500.00			90.00	600.00(2)	20,190.00
S. L. Clunis	Essex	19,500.00			36.00	600.00(2)	20,136.00
B. J. S. MacDonald	Essex	19,500.00				1,500.00(2)	21,000.00
M. W. Strange	Frontenac	19,500.00				500.00(1)	20,000.00
C. E. Bennett	Grey	19,500.00			96.00	500.00(2)	20,096.00
W. W. Leach	Haldimand	19,500.00		500.00	306.00		20,306.00
G. E. Elliott	Halton	19,500.00			270.00		19,770.00
J. C. Anderson	Hastings	19,500.00		550.00	264.00	1,250.00(2)	21,564.00
R. S. Hetherington	Huron	19,500.00				120.00(1)	19,620.00

^(a)Annual salaries of county and district court judges were increased in 1967 by \$3,000; see p. 683 *supra*.

L. A. McLennan	Kenora	19,500.00	*500.00	20,000.00
W. B. Beardell	Kent	19,500.00	186.00	20,686.00
R. A. Carscallen	Lambton	19,500.00	90.00	20,090.00
E. M. Shortt	Lanark	19,500.00		19,900.00
W. B. DuBrule	Leeds & Gren.	19,500.00	108.00	20,308.00
G. F. Smith	Lenn. & Add.	19,500.00	78.00	19,678.00
T. J. Darby	Lincoln	19,500.00	100.00 (Est.)	23,200.00
G. E. Collins	Manitoulin	19,500.00	2,000.00	20,000.00
I. MacRae	Middlesex	19,500.00	*500.00	21,000.00
Wm. E. C. Colter	Middlesex	19,500.00	1,500.00 (1)	19,500.00
D. C. Thomas	Muskoka	19,500.00		20,000.00
M. N. Lacourciere	Nipissing	19,500.00	*500.00	21,000.00
G. A. P. Brickenden	Norfolk	19,500.00	*500.00	20,908.00
J. C. N. Currelly	North. & Dur.	19,500.00	408.00	19,692.00
A. C. Hall	Ontario	19,500.00	192.00	21,086.00
E. W. Cross	Oxford	19,500.00	336.00	20,138.00
W. Little	Parry Sound	19,500.00	138.00	20,000.00
E. W. Grant	Peel	19,500.00	*500.00	20,608.00
H. D. Lang	Perth	19,500.00	108.00	20,220.00
H. R. Deyman	Peterborough	19,500.00	120.00	20,018.00
O. H. Chartrand	Pres. & Russ.	19,500.00	18.00	19,938.00
W. S. Lane	Prince Edward	19,500.00	300.00 (1)	19,612.00
A. R. Huggill	Rainy River	19,500.00	100.00 (1)	20,100.00
T. M. J. Galligan	Renfrew	19,500.00	100.00 (1)	19,832.00
J. G. Harvie	Simcoe	19,500.00	200.00 (1)	20,212.00
A. M. Carter	Simcoe	19,500.00	700.00 (3)	19,740.00
G. E. Brennan	Stormont, Dundas & Glengarry	19,500.00	240.00	20,556.00
J. M. Cooper	Sudbury	19,500.00	156.00	20,000.00
A. St. Aubin	Sudbury	19,500.00	*500.00	21,000.00
P. J. McAndrew	Sudbury	19,500.00	*500.00	20,000.00
J. B. Robinson	Teniskaming	19,500.00	*500.00	20,200.00

County and District Court Judges—(Continued)

<i>Judge</i>	<i>Jurisdiction</i>	<i>Salary and Prov. Allowance</i>	<i>Juvenile & Family Court</i>	<i>Division Court (fees)</i>	<i>Police Commission</i>	<i>TOTAL</i>
J. W. Ross	Thunder Bay	\$19,500.00	\$	\$*500.00	\$900.00(2)	\$20,900.00
J. G. Roberts	Thunder Bay	19,500.00		*500.00		20,000.00
H. E. Richardson	Victoria	19,500.00	1,000.00	192.00		20,692.00
D. S. Charlton	Waterloo	19,500.00		102.00	1,650.00(5)	21,252.00
F. Costello	Waterloo	19,500.00		36.00		19,536.00
H. E. Fuller	Welland	19,500.00	2,900.00	258.00	3,700.00(5)	26,358.00
F. M. Griffiths	Welland	19,500.00		270.00	800.00(2)	20,570.00
R. S. Clark	Wellington	19,500.00		132.00	300.00(1)	19,932.00
W. A. Maedel	Wellington	19,500.00		24.00		19,524.00
A. L. Ambrose	Wentworth	19,500.00			2,500.00(1)	22,000.00
T. L. McCombs	Wentworth	19,500.00				19,500.00
J. S. Latchford	Wentworth	19,500.00		102.00		19,602.00
J. A. Sweet	Wentworth	19,500.00		18.00	200.00(1)	19,718.00
W. K. Warrender	Wentworth	19,500.00		36.00		19,536.00
R. Forsyth	York	20,500.00 ^b				20,500.00
I. M. Macdonell	York	19,500.00			5,000.00(1)	24,500.00
F. Denton	York	19,500.00		120.00		19,620.00
W. F. B. Rogers	York	19,500.00		78.00		19,578.00
H. Waisberg	York	19,500.00		72.00		19,572.00
F. G. H. McDonagh	York	19,500.00		102.00		19,602.00
F. J. MacRae	York	19,500.00		6.00		19,506.00
H. A. W. Timmins	York	19,500.00				19,500.00
Wm. D. Lyon	York	19,500.00		30.00		19,530.00
E. L. Weaver	York	19,500.00		108.00		19,608.00
G. H. F. Moore	York	19,500.00		84.00		19,584.00
W. A. E. Sheppard	York	19,500.00		186.00		19,686.00
W. T. Carroll	York	19,500.00		30.00		19,530.00

^(b)The provincial allowance to the Senior Judge of York County is \$4,500.

JUDGES ACTING AS MUNICIPAL ARBITRATORS

The practice of paying judges as arbitrators in municipal expropriations has varied widely throughout Ontario, with the result that some judges have been paid very large sums for their services while acting as arbitrators to assess damages, while others have received nothing from such sources.

Under the provisions of the Municipal Act, where no official arbitrator has been appointed, the senior judge of the county or district court shall be the sole arbitrator unless he requests a junior judge, or a judge or junior judge of some other county or district, to act for him.⁴ This provision was introduced in its present form in 1927.⁵ Prior to that time the only reference in the Municipal Act to a judge's hearing an arbitration was contained in the Act of 1913,⁶ where it was provided that when the amount claimed in a municipal arbitration did not exceed \$1,000, the compensation should be determined by the judge, or such person as he, on application to himself, might appoint; otherwise arbitrations were under the Municipal Arbitrations Act.

Notwithstanding the provisions of section 347 (1) of the Municipal Act, the council of a municipality may by by-law designate the Municipal Board as the sole arbitrator.⁷

Under the Municipal Arbitrations Act⁸ an official referee may be appointed by the Lieutenant Governor in Council for any municipality to which the Act applies and he shall be known as the Official Arbitrator. Where an Official Arbitrator has been appointed, compensation arising out of expropriation of land shall be fixed by him. The Official Arbitrator shall be a county court judge, or barrister, of, at least, ten years standing.⁹ These provisions were first introduced in 1937¹⁰. Prior to

⁴R.S.O. 1960, c. 249, s. 347(1). (The Beckett Committee on the Municipal Act recommended that ss. 347-349 be repealed if the recommendations of the Select Committee on Land Expropriation, 1962, were adopted. These were not adopted. Second Interim Report of Select Committee on The Municipal Act, 1963, 50.)

⁵Consolidated Municipal Act, Ont. 1922, c. 72, s. 332, as re-enacted by Ont. 1927, c. 61, s. 31.

⁶Municipal Act, Ont. 1913, c. 43, s. 339.

⁷R.S.O. 1960, c. 249, s. 348.

⁸R.S.O. 1960, c. 250, s. 1, as amended by Ont. 1965, c. 78, s. 1.

⁹*Ibid.*

¹⁰Municipal Arbitrations Act, R.S.O. 1937, c. 280, s. 1(2).

that date the duties of the Official Arbitrator were performed by a barrister of, at least, 10 years standing.

There is, therefore, no act now in force that was in force on July 1, 1920, that could be said to have created a right in judges to receive remuneration for acting as municipal arbitrators.

It would appear, therefore, to be quite clear that although a judge is permitted under the Judges Act to act as an arbitrator, "to assess or ascertain compensation or damages", if his appointment is made by the Lieutenant Governor in Council, or is authorized by a statute of the Dominion or the province, or if a statute of the Dominion or province requires or authorizes him to act, he is not permitted to accept remuneration for so acting.

All this is quite apart from the provisions of the Extra-Judicial Services Act,¹¹ which will be discussed later.

JUDGES ACTING IN LABOUR ARBITRATIONS

Under the Labour Relations Act, every collective agreement is required to provide "for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable".¹²

If a collective agreement does not contain such an arbitration clause, a statutory arbitration clause to this effect is deemed to be contained in the agreement. The statutory clause provides the way in which the arbitrators are to be appointed. Each party appoints one arbitrator, and the two so appointed appoint the chairman. If they fail to agree on a chairman, the appointment of the chairman shall be made by the Minister of Labour. There are other detailed provisions with respect to the arbitration that are unnecessary to the discussion in this context.

In Ontario a very wide practice has been developed to use county court judges as chairmen of boards of arbitration set

¹¹R.S.O. 1960, c. 128.

¹²R.S.O. 1960, c. 202, s. 34.

up under the provisions of the Labour Relations Act. Sometimes they are chosen by the parties and sometimes they are appointed by the Minister of Labour. These are arbitrations arising out of a contractual relationship. Although the arbitration clause is a statutory requirement of a collective agreement wherever a collective agreement is entered into, the arbitration is not one contemplated by section 38 of the Judges Act. The arbitrators are required to settle all differences between the parties arising out of the contract. This is not the sort of arbitration that a judge is permitted to engage in under section 38. When acting as a chairman of a board of arbitration under a collective agreement, he is not acting under the authority of an order in council passed by the Governor in Council or Lieutenant Governor in Council. There is no statutory authority expressly authorizing the Governor in Council or the Lieutenant Governor in Council to appoint a judge to act as such an arbitrator, nor does a judge when acting as such an arbitrator under a collective agreement come within subsection (3) of section 38 of the Judges Act. He is not required or authorized by any statute of Canada or of any province to act as an arbitrator under such circumstances.

The exception contained in subsection (3) of section 38 is confined to an arbitrator who is empowered "to assess or ascertain compensation or damages". The duties of an arbitrator under a collective agreement go far beyond the ascertaining of compensation or damages. In fact that aspect of his duties is very rarely, if ever, dissociated from other duties requiring the determination of liability and other matters.

In addition to the prohibition against judges' acting as arbitrators, contained in section 38 of the Judges Act, there are the very express prohibitions contained in section 39 (1) against judges' accepting any remuneration when they are acting as arbitrators, even where they are permitted to do so within the exceptions contained in section 38. As has been pointed out, the language of section 39 (1) is a clear and unequivocal prohibition against a judge's accepting remuneration when he is permitted to act as an arbitrator within the exceptions contained in section 38.

It has been difficult to obtain precise information as to what amounts have been paid to county judges for acting in labour arbitrations over a period of years, as these payments were not made by the province but by the parties to the arbitrations. It would appear that the practice of county judges' conducting labour arbitrations is confined to about sixteen judges who are specially chosen for this work from time to time by the parties involved. A committee of the county judges co-operated with the Commission to obtain some information as to the amount received by county and district court judges for conducting labour arbitrations. In the year 1964,

- 3 judges received between \$7,000 and \$10,000 each;
- 4 judges received between \$5,000 and \$ 7,500 each;
- 2 judges received between \$3,000 and \$ 5,000 each;
- 4 judges received between \$1,000 and \$ 3,000 each;
- 3 judges received between \$1,000 and \$ 1,500 each.

This shows the net income received from these sources. The breakdown showing which judges were in receipt of these sums is not available but the information is sufficient to establish that the judges involved must have devoted a very considerable part of their time to labour arbitrations to earn the amounts paid, and while doing so they would not have been available for their ordinary duties in the administration of justice in the province.

CONCILIATIONS

Under the provisions of the Labour Relations Act, the Minister of Labour has power under certain circumstances to appoint a conciliation officer or a conciliation board.^{12a} It has been the practice in Ontario for several years to appoint county and district court judges to act as conciliators. During the years, 1961-1965, twenty-one county and district court judges acted as conciliators. The fees paid to them by the province are set out in the following table.

^{12a} Labour Relations Act, R.S.O. 1960, c. 202, s. 14, as re-enacted by Ont. 1966, c. 76, s. 4; and s. 16.

Fees Received by County and District Court Judges as Conciliation Officers

	1960-61	1961-62	1962-63	1963-64	1964-65	Total
Judge J. C. Anderson	\$4,020.00	\$1,440.00	\$2,100.00	\$3,062.00	\$1,440.00	\$12,062.00
Judge C. E. Bennett	720.00	600.00	3,180.00	2,280.00	1,320.00	8,100.00
Judge R. S. Clark	1,560.00	....	180.00	....	....	1,740.00
Judge J. M. Cooper	540.00	....	....	480.00	....	1,020.00
Judge E. W. Cross	....	....	540.00	....	....	540.00
Judge H. J. Donley	1,380.00	360.00	....	....	....	1,740.00
Judge A. H. Dowler	....	....	....	360.00	660.00	1,020.00
Judge W. S. Lane	2,280.00	3,180.00	780.00	1,680.00	600.00	8,520.00
Judge H. D. Lang	2,260.00	960.00	1,380.00	900.00	1,080.00	6,580.00
Judge W. Little	5,880.00	5,820.00	4,560.00	2,205.00	600.00	19,065.00
Judge P. J. MacDonald	540.00	420.00	....	....	....	960.00
Judge P. S. MacKenzie	....	....	360.00	....	1,020.00	1,380.00
Judge F. J. MacRae	470.00	300.00	360.00	....	....	1,140.00
Judge K. MacRae	780.00	180.00	....	....	....	960.00
Judge P. J. McAndrew	....	....	360.00	180.00	....	540.00
Judge T. L. McCombs	240.00	....	240.00	....	....	480.00
Judge R. W. Reville	660.00	1,560.00	2,340.00	4,740.00	1,440.00	10,740.00
Judge J. B. Robinson	4,380.00	2,400.00	1,140.00	1,590.00	2,640.00	12,150.00
Judge W. F. Schwenger	360.00	1,080.00	....	....	....	1,440.00
Judge P. C. Thomas	1,380.00	300.00	1,800.00	1,320.00	....	4,800.00
Judge H. Waisberg	....	....	....	240.00	125.00	365.00

Prior to the 1967 amendment, there was no provision under the Judges Act which permitted a judge to act as a conciliator and payment of fees for so acting was prohibited. Both the Government of Canada and the provincial legislatures have been parties to this illegal practice.

EXTRA-JUDICIAL SERVICES ACT

The illegality of the practice of paying judges to act as arbitrators or conciliators was recognized by the Ontario Legislature in 1955 when the Extra-Judicial Services Act was amended.¹³ Under this Act a judge is defined as "a judge within the meaning of the Judges Act (Canada)". The relevant portions of the Act since its amendment in 1955 read as follows:

"2. (2) A judge may act as a conciliator, arbitrator, referee or on a commission of inquiry pursuant to an Act of the Legislature or pursuant to an agreement made under any such Act.

(3) Notwithstanding any statutory provision, regulation, rule, order or agreement, where a judge acts as a conciliator, arbitrator or referee he shall not receive any remuneration for his services other than such transportation and living allowance as the Lieutenant Governor in Council fixes by general or special order."¹⁴

It is to be noted that the permissive clause, section 2 (2), is contrary to the provisions of the Judges Act, as it previously was and now is. It purports to permit a judge to act as a conciliator as well as an arbitrator or a referee, or on a commission of inquiry pursuant to an act of the Legislature and pursuant to any agreement made under an act of the Legislature. These provisions are contrary to sections 38 and 39 of the Judges Act, as they previously were, in two respects:

(1) They purport to permit a judge to act as "a conciliator, arbitrator, referee or on a commission of inquiry pursuant to" any agreement made under a statute of the Legislature. While the new section 38 prohibits a judge from so doing unless "the judge is by an act of the Legislature or of the province expressly authorized so to act, or he is thereto

¹³Ont. 1955, c. 20.

¹⁴Extra-Judicial Services Act, R.S.O. 1960, c. 128, s. 2(2)(3).

appointed or so authorized by the Lieutenant Governor in Council of the province", nowhere in either of the statutes is a judge authorized to act in any capacity pursuant to "any agreement made" under an act of the Legislature.

(2) The Act purports to give to the Lieutenant Governor in Council power to fix a living allowance at any amount. Under the 1967 amendment to the Judges Act, the living allowance for a judge acting as a commissioner, arbitrator, and so on, is expressly fixed to be such "as if he were performing a function or duty as such judge." The living allowances for judges are now fixed by section 21, previously quoted.¹⁵

It is difficult to see how the legislature of a province can permit a judge to do that which he is prohibited from doing under the Judges Act. Be this as it may, section 2 (3) reinforces the Judges Act by placing an express prohibition on a judge's receiving "any remuneration for his services other than such transportation and living allowance as the Lieutenant Governor in Council fixes by general or special order".^{15a} These are the precise words of the relevant portions of section 39 (3) of the Judges Act, as it previously was, except that they make no reference to judges' acting on commissions of inquiry, as does section 39 (3). Section 2 (3) would appear to comprehend all services rendered, not only as a conciliator but as an arbitrator or referee under any statute or under any agreement, and would appear expressly to prohibit judges from receiving remuneration for their services, whether it be as municipal arbitrators, labour arbitrators, as conciliators, or in any other capacity authorized by law. When this Act was introduced in the Legislature, the then Attorney General of Ontario, the Honourable Dana Porter, made the following statement:

"Mr. Speaker, some question has been raised as to the practice which has been carried on, for a number of years, where Judges, either of the Supreme or County Courts, have acted as conciliators, arbitrators, or referees. This Bill proposes that, notwithstanding any statutory provisions, regulations,

¹⁵See p. 685 *supra*.

^{15a}Extra-Judicial Services Act, R.S.O. 1960, c. 128, s. 2 (3).

rules or agreement, where a Judge acts as conciliator, arbitrator or referee, he shall not receive remuneration for that service other than such travelling and living allowances as the Lieutenant Governor in Council may fix by special order. This is complementary to the Judges Act of Canada, and as a result of conferences which have been held with the Honourable Minister of Justice, which would correct the situation which has arisen where some exception has been taken to the payment of Judges acting as conciliators, arbitrators or referees."

A relevant order in council was passed on May 5, 1955, which read, in part, as follows:

"Where a judge acts as a conciliator, arbitrator or referee he shall not receive any remuneration for his services other than a per diem living allowance of \$60.00 together with actual out-of-pocket expenses for railway fares, compartments and taxi cabs or in lieu of such out-of-pocket expenses, where he travels by his own automobile, a mileage allowance of 10¢ for every mile necessarily travelled."

This order in council applies to judges only, and limits the allowances to be made to them for out-of-pocket expenses to their travelling allowances, and \$60.00 a day, stated to be a "living allowance". On April 12, 1956, a special order in council was passed.¹⁶ It does not apply specifically to judges. It reads in part as follows:

"2. The amount or remuneration of a chairman of a conciliation board for his several duties as such shall be:

- (a) \$60.00 for each day,
 - (i) that he is present when the board sits,
 - (ii) necessarily spent in travelling from his place of residence to meetings of the board and returning therefrom, or
 - (iii) during which he is engaged in preparing the report of the board's findings and recommendations, not exceeding two days;
- (b) the amount of,
 - (i) his railway fare including expenses for a compartment, and
 - (ii) his taxi-cab fare,
 where necessarily, actually, and reasonably expended in connection with the work of the board; and

¹⁶Now R.R.O. 1960, Reg. 399, s. 2.

(c) where he travels by his own automobile in connection with the work of the board, ten cents for every mile necessarily travelled."

This order in council fixes the "remuneration" of a chairman of a conciliation board at \$60.00 a day, while the 1955 order in council fixed the "living allowance" of a judge at the same sum per day. Later the Governor in Council passed an order in council fixing the living allowance at \$60.00 a day for those judges who were engaged in conciliation duties over which the federal government had jurisdiction. This was increased on May 7, 1964, to \$100 a day. Judges are not specifically mentioned in these orders in council.

If one is to be guided by the charges made for living allowances by judges, it would appear that one judge must have spent, during the five-year period under review, 300 days engaged on conciliation, while two others spent 200 days, and another 175 days.

Conciliation work has no relation to the ordinary judicial duties of a judge, and quite irrespective of the legal position it would not appear that it is the sort of work in which a judge who presides in court and determines the rights of parties should be engaged.

It is fair to ask the question: Why was \$60.00 a day fixed as a living allowance for a judge in the 1955 order in council and the same amount fixed as remuneration for the chairman of a conciliation board in the 1956 order in council, and why were \$60.00 and \$100 a day respectively fixed by the Dominion orders in council? Neither sum has any relation to out-of-pocket expenses for one engaged on conciliation or arbitration. At the time the sum of \$60.00 a day was fixed as a living allowance for judges acting as conciliators or arbitrators, a judge was allowed \$12.00 and \$8.00 per day for living allowance while on his ordinary judicial duties, depending on whether those duties took him away from his home to a city or a town. Obviously the sums were inadequate and were subsequently increased to \$15.00 and \$12.00 per day respectively.

In 1960 the provisions for a fixed allowance for judges performing their ordinary duties were repealed¹⁷ and it was

¹⁷Can. 1960, c. 46, s. 2.

provided that a judge should be allowed only his actual out-of-pocket expenses while absent from his residence performing his ordinary judicial duties. It is hard to see how the Provincial or Dominion governments could justify paying judges \$60.00 or \$100 a day as living allowances while they were engaged as conciliators or arbitrators, when it is considered that only properly certified out-of-pocket expenses should be paid to them while they were engaged away from their homes on ordinary judicial business.

The only conclusion that can be drawn from the orders in council in question, fixing amounts that may be paid to a judge at \$60.00 or \$100 per day for a living allowance, is that these amounts were intended to provide judges with some remuneration for their services, to divert them from their ordinary judicial duties and induce them to assume those forbidden not only by the Judges Act of the Dominion, but by the Extra-Judicial Services Act of Ontario as well. This is the sort of subterfuge in which neither governments nor judges should be engaged. Respect for the Rule of Law demands that governments and judges not only observe the letter, but also the spirit, of the law.

The practices we have discussed were condemned by the Auditor General of Canada in his report in 1962¹⁸ and again before the Parliamentary Committee on June 2, 1964. They had been previously condemned by the late Honourable John Hackett, Q.C., a president of the Canadian Bar Association, as long ago as 1946.¹⁹ These practices were reviewed and discussed at length by Mr. Eric Silk, Q.C., in his report to the Attorney General in 1961. He did not discuss the legality of the practices, but he was of the opinion that it was undesirable to use judges as arbitrators and conciliators. Mr. Silk stated:

“Should the view be taken that, for a reason that is beyond my comprehension, these chairmanships must be filled by county and district court judges, then to assure that distribution of the work that the carrying on of the county and district court system demands, the function should be declared

¹⁸Annual Report of the Auditor General of Canada (1962), 25, 26.

¹⁹H.C.Deb. 2709 (1946).

by statute to be a part of the regular duties of these judges and its assignment must be vested in an official of that court system at the judicial level. Failing the establishment of the office of chief judge of the county and district courts I cannot suggest where the authority should lie.”^{19a}

Mr. Silk’s final recommendation was as follows:

“It is accordingly my recommendation that immediate steps be taken with a view to arranging for the establishment of the office of Chief Judge of the County and District Courts, with appropriate authority in line with the observations here made; that steps be taken to render uniform the classes of duties and responsibilities of county and district court judges particularly in the matters referred to herein, and that in line therewith consideration be given to the establishment of a panel of impartial arbitrators of high calibre.”^{19b}

Mr. Silk’s report was implemented by the establishment of the office of the Chief Judge of the County and District Courts, and in 1962 by the passing of the Approved Impartial Referees and Arbitrators Act.²⁰ This Act has not yet been proclaimed. In the meantime, the judges’ salaries and allowances have been increased, but no steps were taken by the Province to curb or limit the illegal practices of employment of county and district court judges as arbitrators and conciliators, which practices were, on the other hand, encouraged.

The legal aspects of the appointment of judges as conciliators and arbitrators, and the payment of remuneration to them for their services, may be summed up in this way:

(1) The appointment of a judge as a conciliator was contrary to the provisions of the Judges Act prior to March 1, 1967.

(2) The appointment of a judge as an arbitrator or referee to perform duties other than the ascertainment of compensation or damages was contrary to the Judges Act prior to March 1, 1967.

^{19a} Report to the Attorney General for Ontario on the Jurisdiction of County and District Courts (1961), 70.

^{19b} *Ibid.*, 72.

²⁰ Ont. 1961-62, c. 5.

(3) It is now unlawful for a judge to act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceedings, unless authorized to do so by an act of Parliament or an act of the Legislature, or unless he is appointed or authorized to do so by order of the Governor General in Council or the Lieutenant Governor in Council.

(4) In no case can a judge appointed to be a commissioner, arbitrator, etc., after March 1, 1967, accept remuneration for his services. To do so is not only contrary to the Judges Act of Canada, but to the Extra-Judicial Services Act of Ontario as well.

(5) A judge performing extra-judicial services may only accept the same out-of-pocket expenses as he is allowed while performing his regular duties as a judge, that is, his moving and transportation expenses and reasonable travelling expenses actually incurred while he is absent from his home, and nothing more.

(6) Any living allowance fixed by order in council, in cases of expenses actually incurred, is a disguised form of remuneration and is illegal.

(7) Prior to March 1, 1967, a judge might act as a commissioner if appointed to do so under authority of an order in council authorized by a statute of the Dominion or the Province, or he might act as a commissioner to conduct an inquiry if authorized by a statute of the Dominion or the Province, but he might not receive any remuneration for his services other than proper out-of-pocket expenses.

(8) Quite apart from the Judges Act, the provisions of the Extra-Judicial Services Act override all other provincial legislation and it therefore follows that in no case is it legal in this Province to pay a judge remuneration, or for any judge to receive remuneration, for services rendered as a conciliator, arbitrator or referee with respect to any matter over which the Province has legislative jurisdiction, whether those services are rendered pursuant to a provincial statute or to any agreement.

THE PURPOSE OF THE LAW

So far we have discussed the practice of the employment and payment of judges as commissioners, arbitrators, conciliators or referees from a purely legal point of view. Apart from the illegality of the practice that has been engaged in in Ontario, it is highly undesirable for any judge to be in the employ and the pay of any government or person or corporation, or to receive any remuneration, except the salary and allowances attached to his office as a judge, payable alike to all judges of equal rank. We have said, and we repeat it in this context, "the most essential and fundamental characteristic of the courts of justice is that they be independent".

This is the historic charter of the protection of the rights of the individual against encroachment by the State or any person or corporation. Not only must judges be independent, but it is essential that the individual citizen should have confidence in their independence. Where a judge engages in activities for which he receives remuneration beyond the statutory salary and allowances that are provided by statute for all his brother judges, he has lost some of his independence, and certainly if he has not lost his independence he has lost the appearance of independence. Where a judge has received a fee from an individual, a corporation or a government, over and above the salary and allowances fixed by law, he has put himself in such a position that a party engaged in a contest before him in the courts may well feel that there is not true independence, if the other party to the contest has been one in whose pay the judge has been by rendering extrajudicial services. This is the predominant reason for the constitutional provision that the salaries and allowances of the judges shall be fixed by Parliament.

In addition to the violation of this fundamental concept of the independence of the judges, it is unfair and unjust that some judges who divert their time and talents from their regular judicial duties should be permitted to earn very large sums out of such diversion, in addition to the salaries and allowances attached to their offices, while other judges who confine themselves strictly to their judicial duties receive only the fixed salaries and allowances.

It is no answer to say that the judicial work in a particular county is up to date and that a judge should, for special remuneration, be free to engage in extra-judicial duties. In 1962 the County Judges Act was amended²¹ to make provision for the office of Chief Judge of the County and District Courts, to be president of the county and district courts, to ensure the dispatch of business of the various courts, including chambers. He was given general supervisory powers over the arrangement of sittings of the county and district courts, including chambers, and power to make such readjustment and reassignment of the duties of the county and district court judges as he might deem necessary or proper from time to time.

The Chief Judge, who holds a very important and necessary office, is put in a most difficult position to see that the proper arrangements are made to ensure the dispatch of the business of the various courts, if the judges under his direction are permitted to engage in the private *ad hoc* duties that in no way come under his supervision. In some sections of the Province the work in the county and district courts at times becomes delayed and congested, requiring special judicial assistance. Judges may take ill and at times there are vacancies. The extra burden of providing relief ought not to fall only on judges who do not engage in extra-judicial activities. It has been suggested that judges in smaller communities, whose ordinary judicial duties may not be as heavy as those in other centres, should be made available for extra-judicial assignments. An examination of the records indicates that the judges engaging in these activities are by no means drawn only from the smaller communities.

The greatest drain on the judicial strength for municipal arbitrations has been in the County of York. The fixing of compensation for land taken by expropriation is a judicial function. If it is desirable that this function should be performed by judges, it is quite proper for the Legislature to say so, but there is no reason why a judge performing this function should be paid a fee by the parties to the arbitration while his brother judges assessing damages and fixing compen-

²¹R.S.O. 1960, c. 77, s. 16, as re-enacted by Ont. 1961-62, c. 25, s. 9.

sations in ordinary damage actions do so with no extra remuneration.

We agree with Mr. Silk that if the duties that are now performed by judges as arbitrators and referees outside of their regular judicial duties are duties that ought to be performed by judges, the jurisdiction should be conferred on them by statute and not by special agreement or assignment. It is for the Legislature to determine what the jurisdiction of judges should be; it is for the judges to perform the judicial duties that are assigned to them by the Legislature, and it is for the respective governments to provide for the remuneration and allowances for judges in statutory form, according to the constitution. This would appear to be the view of Parliament as expressed in the 1967 amendment to the Judges Act. The provisions of the Judges Act and the Extra-Judicial Services Act, where not in conflict therewith, should henceforth be observed strictly. There should be no special fees or allowances for any services that may be rendered by the judges in any capacity, whether they act as commissioners, conciliators, arbitrators, referees, members of boards of commissioners of police, or in any other capacity.

COMMISSIONERS

In addition to judges' acting in other capacities, they are frequently appointed to be commissioners under the Public Inquiries Act, or to conduct judicial inquiries under the Municipal Act. It is quite clear that it is now, and previously was, unlawful to pay, and unlawful for a judge to receive, any remuneration in addition to his reasonable travelling and living allowances as provided by section 39 of the Judges Act. Many judges have rendered great public service as Royal Commissioners and commissioners conducting judicial inquiries, without any fee. To the credit of these judges, there are cases on record in which either municipalities or the provincial government have improperly offered to pay judges for the services rendered in these capacities, but the payments have been declined, notwithstanding that long and arduous duties were imposed on the judges who conducted the inquiries.

The Government of Ontario has taken these services into consideration in making a statutory allowance to all Supreme Court judges of \$4,000 a year, and to all county and district court judges \$3,500 a year. (The senior judge of the County of York receives \$4,500.) These sums were stated to be in lieu of all fees or allowances payable to the judge. These respective sums were also stated to be "as compensation for the services that he [a Supreme Court Judge] is called on to render by any Act of the Legislature in addition to his ordinary duties",²² and "in lieu of all fees and allowances payable to the judge [a county or district court judge] . . . for any services performed by him under any act of Legislature. . . ."²³ As far as county court judges were concerned, the provision did not apply or affect the payment of an allowance or fees to a judge with respect to any office "that may be lawfully held by him in addition to his office as a judge, to which an allowance or a salary is attached, or in performance of his duties as an arbitrator or referee under any statute designating him by his name of office as an arbitrator or referee."²⁴

These provisions must now be read with the 1967 amendment to the Judges Act, which provides for payment by the Government of Canada "of any additional salary of \$2,000.00 per annum as compensation for any extra-judicial services that he may be called upon to perform by the Government of Canada or the government of a province and for the incidental expenditures that a fit and proper execution of his office as a judge may require". This additional salary is not payable to a judge who receives from a province any annual or other periodic compensation as a judge of a superior or county court. The result is that the judges in Ontario who receive an additional allowance from the Province for extra-judicial services do not receive from the Government of Canada the extra allowance of \$2,000 provided for those services. The scheme of the Act is to permit the province to pay an annual or periodic compensation to the judges for extra-judicial services, but nowhere is a judge permitted to accept

²²Extra-Judicial Services Act, R.S.O. 1960, c. 128, s. 1.

²³County Judges Act, R.S.O. 1960, c. 77, s. 9(6).

²⁴*Ibid.*, s. 9(7).

a salary or fees from any other body, nor is he permitted to accept a salary or fees that are not paid to all other judges alike. The prohibitions of the Judges Act as amended in 1967 do not apply to a "commissioner, arbitrator, adjudicator, referee, conciliator or mediator" who was appointed before the first of March, 1967. This exception may be of little consequence as the duties performed under the respective appointments will by now have been largely completed, and new appointments will come within the 1967 amendment. It is to be observed that the exception does not apply to members of boards such as boards of commissioners of police, licensing boards, and so on. The word "commissioner", as used in the context of section 39 (2), would appear to mean one holding a commission from Her Majesty.

If the statutory allowances provided by the Province are not sufficient to reasonably compensate the members of the respective courts for the extra-judicial burdens placed on them, they may be reviewed. In the reviewing it may be borne in mind that it is not unreasonable to expect that in the future judges will, as they and as other members of the public have in the past, render important public service without expecting extra monetary reward.

RECOMMENDATIONS

1. As far as possible the regular judicial duties of judges should not be interfered with by their appointment to extra-judicial duties.
2. A judge of the Court of Appeal, the High Court of Justice, or a county or district court, ought not to be asked to perform extra-judicial duties without first getting the approval of the Chief Justice of Ontario, the Chief Justice of the High Court, or the Chief Judge of the County and District Courts respectively.
3. Where judges are asked to perform extra-judicial duties, the provisions of the Judges Act should be strictly observed. No judge should be paid or permitted to receive remuneration other than the statutory salary and allowances provided for judges.

4. The Extra-Judicial Services Act,²⁵ the County Judges Act,²⁶ and the Surrogate Courts Act,²⁷ should be amended to conform to the provisions of the Judges Act.²⁸

²⁵R.S.O. 1960, c. 128.

²⁶R.S.O. 1960, c. 77, s. 9, as amended by Ont. 1962-63, c. 28.

²⁷R.S.O. 1960, c. 388, s. 8(4), as enacted by Ont. c. 97, s. 1.

²⁸R.S.C. 1952, c. 159, as amended by Can. 1966-67, c. 76.

Section 4

THE MACHINERY OF JUSTICE AND THE INDIVIDUAL

CHAPTER 47

Power of Arrest

FOUR ways are provided by law to secure the attendance of an accused before the court:

- (1) Arrest without a warrant;
- (2) A summons issued by a justice of the peace on an information laid before a justice of the peace;¹
- (3) Arrest with a warrant issued by a justice of the peace on an information laid before a justice of the peace;²
- (4) A traffic ticket summons issued under the provisions of the Summary Convictions Act.³

ARREST

The purpose of the power of arrest may be threefold:

- (a) To detain an accused until he may be dealt with by a properly constituted court of law;
- (b) To restrain an accused from committing a breach of the peace or harming himself or others;
- (c) Preventing interference with legal processes or the discharge of duties by public servants.

Any actual restraint imposed on a person's liberty against his will constitutes an arrest. The restraint may be imposed

¹Crim. Code, ss. 439, 695.

²*Ibid.*

³R.S.O. 1960, c. 387, s. 7.

by the application of force, or by circumstances that imply a threat of force.

"So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood."⁴

An arrest is irreversible. The person arrested must remain in custody until trial, unless admitted to bail, and even if admitted to bail he is not entirely free. He is subject to further order of the court and may be taken into custody if bail is cancelled. Under our way of life, an arrest always has some stigma attached to it.

The concept of the power of arrest is a legacy from the common law when all felons were arrested and there were hundreds of offences punishable by execution. At that time everything criminal was treated with such severity that the means by which the proceedings were commenced were relative.⁵ The development of civilization has been measured to some extent by the manner in which offenders against the law have been treated, and likewise by the manner in which powers to put restraint on the liberty of the subject have been dispensed by legislative bodies.

We are primarily concerned with the powers of arrest given by the Ontario Legislature, and the ways in which they are exercised. While the federal law granting the power of arrest is a matter over which the Province has no control, the responsibility for the proper exercise of the law lies with the Province.

ARREST WITHOUT A WARRANT

Where the power of arrest without a warrant is given by statute, it confers on police officers a power of decision affecting the liberty of the subject. It is an administrative act and not a judicial one. If the power of arrest is exercised, when a summons would have been sufficient, the subject has no

⁴*Bird v. Jones* (1845), 7 Q.B. 742, 748.

⁵Puttkammer, *Administration of the Criminal Law* (1953), 68.

redress. It is left entirely to the person exercising the power to determine whether the individual involved will be restrained of his liberty, with all the attendant personal consequences. One of the outstanding crown attorneys in Ontario stated to the Commission:

“Apparently officers only rarely exercise any discretion as to whether it is necessary to arrest a person rather than to summons him. Some simply are not aware that the discretion exists. Others view arrest as a sort of pre-trial. Others still view it as more convenient. . . . Plainly there are too many unnecessary arrests without a warrant.”

Before the Legislature confers a power peremptorily to deprive an individual of his liberty, two questions should always be answered:

- (1) Is the power necessary?
- (2) Will the exercise of the power impose a punishment out of all proportion to the penalty that might be imposed by a judicial officer if the person is found guilty of the alleged offence?

All offences are either indictable or summary offences. All indictable, and some summary, offences are created by the Parliament of Canada. All offences created by the Legislature of the province are summary offences. It is, therefore, useful first to examine the power of arrest without a warrant given at common law and under the Criminal Code.

At common law, felonies were heinous offences, all punishable with forfeiture of property. This gave rise to the term felony. All were punishable with death, except petty larceny. Murder, manslaughter, burglary, house-breaking, larceny, bigamy and rape were examples of felonies at common law, but perjury, conspiracy, fraud, false pretences and assault were misdemeanours, lesser crimes.⁶ At common law, as a general proposition, neither a private citizen nor a peace officer had power to arrest without a warrant for a misdemeanour, or a lesser crime, as distinct from a felony, or a serious crime, unless the offence was committed in the citizen's or the officer's presence and involved a breach of the peace, that is,

⁶Kenny, *Outlines of Criminal Law* (16th ed.), 93.

conduct involving some threat of physical violence to the person.⁷ Peace officers were not given any powers to arrest without a warrant for misdemeanour, on "reasonable and probable grounds" for believing that the offence had been committed, as in the case of felony. These common law limitations reflect a deep-seated consideration of the rights of the individual.

There are only two instances in which the power of arrest for a summary conviction offence is given to a private citizen under the Criminal Code:

(a) When an offence is committed on or in relation to his property;⁸

(b) To prevent the continuance or renewal of a breach of the peace.⁹

A peace officer may arrest an individual without a warrant for a summary conviction offence in those cases in which the private citizen may do so, and where he actually finds the accused committing the offence.¹⁰ It is essential in such cases that the offence be committed in the officer's presence and he must see it being committed.¹¹ No latitude is given to the peace officer. If the person arrested is innocent, notwithstanding that the officer had reasonable and probable grounds for believing him guilty, the arrest is illegal.¹² Even if the person is guilty, the arrest will be illegal unless the offence was actually committed in the presence of the officer.

POWER TO ARREST WITHOUT A WARRANT UNDER PROVINCIAL STATUTES

The Highway Traffic Act¹³

Under this Act, and certain other statutes which we shall discuss, powers of arrest without a warrant have been conferred with abandoned liberality, without regard for historic

⁷Mooreland, *Modern Criminal Procedure* (1959), 3.

⁸Crim. Code, s. 437.

⁹*Ibid.*, s. 30.

¹⁰*Ibid.*, s. 435(b).

¹¹*R. v. Hills* (1926), 44 C.C.C. 329; *R. v. Hurlen* (1959), 123 C.C.C. 54.

¹²*A. G. Saskatchewan v. Pritchard* (1961), 130 C.C.C. 61.

¹³R.S.O. 1960, c. 172.

principles, necessity or elementary safeguards of civil rights or human dignity. Under the Highway Traffic Act not only are these powers conferred on constables who may have some training in the execution of their duties, but on every officer "appointed [by the Minister] for carrying out the provisions" of the Act.¹⁴

"159. (1) The Minister may appoint one or more persons on the staff of the Department as an officer or officers for the purpose of carrying out all or any of the provisions of this Act, and any person so appointed has authority to act as a constable throughout Ontario for such purpose."¹⁵

It will be observed that when section 156 of the Act is read with section 7 (1), the power of arrest without a warrant extends to a failure to comply with regulations passed by the Lieutenant Governor in Council. In no case should the Lieutenant Governor in Council be given statutory power to confer on anyone the power to arrest an individual without a warrant. However, the provisions of this Act go further in giving powers to arrest without a warrant. For example, a constable who, on reasonable and probable grounds, believes that someone has knowingly made a false statement of fact in "... paper-writing required . . . by the Department . . .", may arrest the person without a warrant.¹⁶ These sections, in substance, give a departmental clerk the power to create an offence for which a person may be arrested without a warrant.

Little concern for the civil rights of the individual was shown when police officers were given the power to arrest without a warrant for the following offences, which are only illustrations:

Failure to notify the Department of a change of address —	Fine \$10 - \$50
Making a false statement in an application or paper writing —	Fine \$20 - \$100
Failure to have licence plates attached —	Fine not more than \$50

¹⁴*Ibid.*, s. 156; and s. 159, as enacted by Ont. 1961-62, c. 52, s. 17.

¹⁵*Ibid.*, s. 159(1), as enacted by Ont. 1961-62, c. 52, s. 17.

¹⁶*Ibid.*, s. 156(2), as amended by Ont. 1964, c. 38, s. 16; see also s. 7(1).

Licence plate improperly placed —	Fine \$5 - \$10
Failure to notify Department within six days of sale or purchase of a motor vehicle —	Fine \$10 - \$50
Exposing a number on a motor vehicle so as to confuse the identity of the number plates—	Fine up to \$50
Interference with a notice placed on the highway —	Fine \$25 - \$100

The more serious offences, racing and careless driving, carry fines up to \$100 and \$500 respectively, together with penalties of imprisonment up to six months and three months respectively. (The penalties indicated are those for first offenders.)

In few of the offences under the Highway Traffic Act can the power of immediate arrest be justified on the ground that the offences are so serious that it would be dangerous to allow the offenders to be at large.

These excessive powers may be useful in assisting the police in the investigation of crime, but the investigation of crime does not justify the conferment of powers of arrest and detention for trivial offences. If the police require such powers, the problem should be faced with legislative honesty and power ought to be given for the purpose for which it is intended to be used.

It might well be that the police should have greater powers to control and investigate the use of motor vehicles on the highway. A motor vehicle is a dangerous machine. If it is not carefully used, it is a lethal one. It is a convenient vehicle for the commission of crimes of all sorts. Those who take motor vehicles on the highway have no civil right to do so. They may do so only if they hold a licence for that purpose. That requirement is no invasion of civil rights. There is no reason why anyone driving a motor vehicle while on the highway should not be required to show an officer of the law enforcement agencies that he has a licence to do so. If the

police have power to question the driver of a motor vehicle for the purpose of verifying his right to drive it, the ownership of the vehicle and the name and address of the owner and driver, there would appear to be little or no need for all the drastic powers of arrest that we have been discussing.

The necessities of the cases would appear to be met if the power of arrest without a warrant were restricted to those cases in which the driver of a motor vehicle, without showing reasonable cause, does not properly identify himself and the owner of the vehicle, and those cases in which the driver does not appear to have any legal right to have the vehicle on the highway. In all other cases the powers of arrest without a warrant, conferred under the Criminal Code, should be sufficient as far as highway traffic control is concerned. This has been the legislative approach in the Province of Quebec, but we think that even there the rights of arrest without a warrant that are given are unnecessarily wide.¹⁷

The Liquor Control Act¹⁸

The Liquor Control Act was extensively revised in 1965.¹⁹ Many vexatious offences were removed but no change was made in the legislation in respect of powers of arrest without a warrant:

"111. Any constable or other police officer may arrest without a warrant a person whom he finds committing an offence against this Act or the regulations."²⁰

This section, when read with sections 1 (r), 9 and 101, confers power on the Liquor Control Board, with the approval of the Lieutenant Governor in Council, to create offences for which a person may be arrested without a warrant. We repeat in this context what has already been said, that in no case should the executive have power to make provision for the arrest of a person without a warrant, nor, especially should an administrative board with the approval of the executive. It is a promiscuous disregard of the rights of the individual and the liberty of the subject for the Legislature to confer on police

¹⁷R.S.Q. 1941, c. 142, s. 58, as amended by Que. 1959-60, c. 67, s. 47.

¹⁸R.S.O. 1960, c. 217.

¹⁹See Ont. 1965, c. 58.

²⁰R.S.O. 1960, c. 217, s. 111.

officers, in any statute, the power to arrest without a warrant in such broad terms as those of the Liquor Control Act, i.e., "any person whom he finds committing an offence against this Act or the regulations". This language applies to any and every offence no matter how trivial. In many cases the punishment inflicted by the arrest is much greater than the punishment the magistrate is empowered to impose if the accused is found guilty.

It may well be that there should be selected offences for which a police officer should have power to arrest without a warrant, if he finds a person committing them. The power might be necessary in the case of drunkenness in a public place and drunkenness accompanied by disorderly conduct, if the arrest is necessary to protect the person arrested or others. In such a case, a law permitting detention beyond the period during which protection is necessary, cannot be justified.

The law and procedure relating to the offence of mere drunkenness should be reviewed and revised, having in mind the purpose of the power of arrest and confinement. It is not for the purpose of punishment that the power of arrest is exercised, but for the protection of the individual, lest he injure himself or others, or be injured by predators. Notwithstanding this, the same procedure and practice now applies to the offence of mere drunkenness as to that of armed robbery. The person is arrested, lodged in jail, an information is laid, he appears in court, is tried and sentenced, usually, to pay a trivial fine with an alternative of imprisonment. If he cannot pay the fine he must go to jail, subject only to the alternative that he may be confined to an institution for the reclamation of alcoholics, "where it appears that he may benefit therefrom".²¹ An intoxicated person who is not disturbing the peace is not a legal problem but a social or medical one, and he should be treated as such. He should not be subject to an ordinary arrest. Some provision should be made for his protective custody, just as if he were ill or mentally disturbed. The Province is not only involved in the sale of liquor but in the promotion of the sale of liquor. It is not too much to ask that it take a greater responsibility for the addiction to the excessive use of liquor.

²¹*Ibid.* s. 106(7), as re-enacted by Ont. 1961-62, c. 72, s. 4.

As we have suggested with reference to offences under the Highway Traffic Act, it might well be that there should be a right of arrest without a warrant where an officer finds a person committing certain offences, who refuses to give his name and address, or where there are reasonable grounds to believe that the person will not be found at the address given. If such a change in the law was made, other powers of arrest without a warrant under the Liquor Control Act could be confined to drunkenness accompanied by disorderly conduct, and protective detention of those found in an intoxicated condition who should be dealt with as health problems and not as criminal offenders.

The Liquor Licence Act²²

This Act gives powers to constables or other police officers to arrest without a warrant, and uses the same wording as the Liquor Control Act, i.e., "any person whom he finds committing an offence against this Act or the regulations".²³ The Liquor Licence Board may make regulations with the approval of the Lieutenant Governor in Council.²⁴ The Act provides: "Every person who contravenes any of the provisions of this Act or the regulations is guilty of an offence".²⁵

An examination of the regulations demonstrates how frivolous the Legislature has been in conferring powers of arrest and detention, applied to these offences. Most of the regulations relate to the control and sale of liquor on the licensed premises. The premises are well known and the licensee is known. It is hard to justify the power of arrest without a warrant for any of the offences created under the Liquor Licence Act. Some of these offences make nonsense of the law; for instance, a failure to supply suitable covering for the table in the dining room, or an adequate supply of flatware.²⁶ A curious provision of the Act gives a constable power to arrest a licensee without a warrant, if he permits "any constable or other police officer while on duty to consume

²²R.S.O. 1960, c. 218.

²³*Ibid.*, s. 59.

²⁴*Ibid.*, ss. 1(t), 85.

²⁵*Ibid.*, s. 60.

²⁶R.R.O. 1960, Reg. 407, s. 31.

any liquor" in the licensed premises.²⁷ However, the constable consuming the liquor is not guilty of any offence.

It may be that police officers should have power in certain cases to remove persons from licensed premises, such as young persons, but the power to arrest and detain them until they have secured bail is unwarranted.

The Game and Fish Act, 1961-62²⁸

Unusual language is used in this Act to confer the power to arrest without a warrant:

"9. An officer on view may arrest without process any person found committing a contravention of this Act or of the regulations, in which case he shall bring him with reasonable diligence before a competent court to be dealt with according to law."²⁹

In addition to police officers, the term "an officer" includes a conservation officer, deputy conservation officer, or any other person authorized to enforce the Act.³⁰

As with other statutes we have just discussed, the Lieutenant Governor in Council is given power to create offences for which the offender may be arrested without a warrant, but this Act goes further than any other. The Minister of Lands and Forests is given power to make regulations in certain instances, thus giving to the Minister power to create offences for which an offender may be arrested without a warrant.³¹

The conferment of powers to create offences for which a person may be arrested without a warrant in this manner is objectionable, not only on the ground that it is a sort of power that a minister should not have, but that the members of the public have little or no means of knowing what the law is and when they may be liable to summary arrest.

In addition to the powers of summary arrest, an officer has certain powers of search that should be adequate for law enforcement, but the powers of seizure of property are exces-

²⁷R.S.O. 1960, c. 218, s. 53(4)(a).

²⁸Ont. 1961-62, c. 48.

²⁹*Ibid.*, s. 9.

³⁰*Ibid.*, s. 1(18).

³¹*Ibid.*, s. 84, as amended by Ont. 1962-63, c. 48, s. 7, and as further amended by Ont. 1966, c. 60, s. 11.

sive and unwarranted. Where any game or fish is *suspected* of having been taken or possessed in contravention of the Act or the regulations, anything (except an aircraft, vehicle or vessel) *suspected* of having been used in contravention of these Acts or regulations *shall* be seized. The power of seizure is not controlled by an objective test. Except in the case of an aircraft, vehicle or vessel, where the officer "suspects", he *shall* seize. In the case of an aircraft, vehicle or vessel, he *may* seize.³²

The reckless absurdity of these provisions reduces the authority of the law to the ridiculous.

If an officer on searching an automobile finds that certain fish are being transported in it, and he suspects that they may be over the weight prescribed by the regulations, he may seize the automobile. If the alleged offender has exceeded his quota and is convicted of an offence, no matter how trivial, the automobile must be forfeited to the Crown. The court is given no discretion.³³ In such case the Minister has power to grant relief against the forfeiture, in whole or in part, and order the return of the property on such terms and conditions as he deems proper, but the Minister's power is discretionary and it is not reviewable by the court. Thus an arbitrary power to impose a punishment is vested in the Minister, which may be much greater than that vested in the court, but the Minister's power is controlled by the discretion vested in the officer in the first instance, as to whether or not he will seize the automobile.

The result is that the unfortunate fisherman who does not have weigh scales with him may have his automobile seized because the officer may not be a good judge of weight, or he may have his automobile seized and forfeited because he is not a good judge of weight.

It is no answer to the criticism of the powers of arrest that we have been discussing to say that they are wisely exercised. Arbitrary powers are likely to be exercised arbitrarily. The Legislature, and not the law enforcement agencies, is the body that should decide what powers of summary arrest

³²*Ibid.*, s. 15(1)(2), as amended by Ont. 1966, c. 60, s. 4(1)(2).

³³*Ibid.*, s. 15(3).

there should be. Excessive police power will inevitably be abused in some instances. When it is abused it degrades the authority of the law. The Legislature should give no more power than is reasonably necessary for the social needs of citizens, and it should provide proper safeguards against the abuse of all powers.

Assistant Commissioner A. H. Bird of the Ontario Provincial Police discussed the powers of arrest under the Highway Traffic Act, the Liquor Control Act and the Game and Fish Act, with the Commission. He said that an arrest under the Highway Traffic Act is rare and that if he knew of one he would follow it through. The reason for the arrest usually was that the person involved was a resident of another province. He said:

“With the authority we have of a summons and warrant of commitment which we can follow, an arrest of an Ontario resident under the Highway Traffic Act or the Liquor Control Act or the Game and Fisheries Act is rare. Those sections you mention dealing with false registration and bad licence plates—I can’t recall when they were last used as the basis to arrest without a warrant.”

In reply to a question with respect to the powers of arrest under the Game and Fish Act, the Assistant Commissioner said that it was very seldom that there was an arrest under that Act, and went on to say:

“Powers of search and seizure under that [Act] are important because game and fish can be concealed but the power of arrest is seldom used. People who do poaching out of season, taking advantage of nature’s harvest, and so on, are not going anywhere. They are people with jobs and businesses and a summons does the job in 99% of the cases. A warrant under the Game and Fisheries Act is rare indeed.”

It is not to be overlooked that only the members of the Ontario Provincial Police force come under the direction of Assistant Commissioner Bird.

Not only are constables given power to arrest without a warrant under this Act, but like powers are conferred on private persons where certain offences are committed. In no case are such offences punishable by a prison term.

Other Statutes

In ten other statutes the powers of arrest without a warrant are conferred on police officers and others. These do not involve arrest in the popular sense in which the word is understood. The powers to be exercised are in the nature of protective custody. They include power to take charge of neglected children, mentally ill persons, and powers to be exercised for the protection and safety of the members of the public, as well as to regulate the conduct of elections. None of these powers can be said to be such an encroachment on civil rights as to require discussion in this Report.

THE DETENTION OF PERSONS FROM OUTSIDE THE PROVINCE WHO HAVE BEEN CHARGED WITH PROVINCIAL OFFENCES

Persons who come from outside Ontario and commit offences against provincial statutes present difficult problems for law enforcement agencies. On the one hand, it is not just that they be arrested and detained when an Ontario resident would be summoned in similar circumstances. That would be discrimination against visitors to the Province. On the other hand, if such persons leave the jurisdiction, a summons is ineffective to secure their attendance in court and a fine imposed *in absentia* would be unenforceable. It is more than a question of their escaping punishment. This situation undermines law enforcement in the Province.

The problem is more urgent under the Highway Traffic Act, but it sometimes arises in the enforcement of the Game and Fish Act and the Liquor Control Act. A limited attempt to solve it has been made in the Game and Fish Act. The Minister may authorize an officer to collect a money payment from an offender as security for his appearance in court, where the officer is about to lay an information against him for an offence coming within the Act. Where the money payment has been collected and the person charged does not appear in court, he may be tried *in absentia*. Upon conviction, whether or not he appeared in court, the money payment shall be applied to the payment of any fine imposed and the costs, and

the balance, if any, remitted to the convicted person. If no conviction is made, the money payment shall be remitted to the person who made it.³⁴

Legislation of this nature could be made to apply to offences under the Highway Traffic Act, the Game and Fish Act, and certain offences under the Liquor Control Act, where the offences are alleged to have been committed by persons resident outside the province. Greater safeguards should be provided than now exist under the Game and Fish Act. Only a police constable should be allowed to receive the money. The person paying the money, as provided by the Act, should be given a statement notifying the accused of the time and place that he should appear, showing the amount received and stating precisely what it is for and how it may be applied, together with a record of the name of the officer and the police force and detachment of which he is a member. Procedural regulations should be passed setting out the form of the receipt and the notice. It should be in triplicate, two copies of which may be detached from the book of forms: one copy to be given to the accused, one copy to be sent to the clerk of the court with the money received, and one copy to remain in the book of forms and be retained by the constable.

Provision should be made that a notice be sent from the court to the person paying the money showing precisely what money was received and how it was applied. Visitors to the Province should be given no ground to suspect that any money so collected for violations of the law of the Province has not been properly applied. If this practice is put into effect it will require the strictest supervision and audit of the police officers' books of forms and the magistrates' accounts.

SUMMONS AND ARREST WITH A WARRANT

The issue of a warrant for the arrest of any accused person is an alternative to a summons and merely a procedure to secure the attendance of the individual before the court. An information must first be laid, except in the case of the traffic ticket summons charging an offence, and a warrant should never be issued unless it is shown that it is necessary. There

³⁴*Ibid.*, s. 78, as amended by Ont. 1966, c. 60, s. 9.

would appear to be little justification for issuing a warrant for the arrest of anyone charged with an offence under the provincial law, except in those very rare cases where the accused may be in hiding or can be shown to be evading process.

The process by which a warrant is issued is designed as a protection against the invasion of civil rights. The procedure to be followed is clearly laid out in the Criminal Code. After a justice of the peace has received an information, and before he decides whether a warrant or summons should be issued, he must hear and consider:

- (1) The allegations of the informant;
- (2) The evidence of witnesses, where he considers it desirable or necessary to do so, and if a case is made for issuing a summons, he issues one. If a case is made out for issuing a warrant, he issues one.⁸⁵

The law does not regard this procedure as any idle formality, but too often this important step in the administration of justice is treated as a mere formality. More frequently than not, when the police officer asks for a warrant he gets one without demonstrating the need for it.

It may be doubted whether many of the justices of the peace in the Province who have the power to issue warrants know the extent of the jurisdiction they exercise under the law, and that they are required to determine, before they issue a warrant, that the circumstances are such that a summons would not be sufficient to secure the attendance of the accused in court. Where an information is laid charging an offence under a provincial statute, the regular course should be for a summons only to be issued. If a warrant is asked for, the information should clearly state what reasonable grounds there are for believing that a summons will not suffice to bring the accused before the court. In cases where a warrant is issued without reasonable grounds for believing that an accused would not answer to a summons, and he is arrested, if those who have brought about his arrest were made liable for damages for false arrest, there would be far fewer arrests and

⁸⁵Crim. Code, s. 440.

it is not likely that the administration of justice would be impaired. It is not to be overlooked that if a person summonsed does not answer to a summons, a warrant may be issued for his arrest.

THE TRAFFIC TICKET SUMMONS ISSUED UNDER THE SUMMARY CONVICTIONS ACT³⁶

A special procedure is provided for highway traffic offences, in lieu of the procedure set out in the Criminal Code, for laying an information and issuing a summons. The traffic ticket summons in the prescribed form may be delivered by a police officer to the person charged with a highway traffic offence, and when delivered it has the same effect as a summons. The information may be sworn after the traffic ticket summons has been delivered to the accused. It is unnecessary to go into the details of the use of this type of summons. The object of the legislation is to provide a means by which a police officer who has witnessed an offence against the highway traffic laws can make immediate and effective service on the offender. We have had no submissions criticizing this process, except that it is too seldom used.

RELEASE FROM DETENTION

In those cases where it may be necessary to arrest a person for the breach of provincial laws, some simple procedure should be provided for their release pending trial, or when detention is no longer necessary. This is discussed together with the subject of bail.³⁷

RIGHT OF SEIZURE

Under the Highway Traffic Act, a constable making an arrest without a warrant may detain the motor vehicle with which the offence was committed until final disposition of any prosecution under the Act or the Criminal Code, but the motor vehicle may be released once security for its production has been given to the satisfaction of a justice of the peace or a magistrate. All costs for the care or storage of the motor

³⁶R.S.O. 1960, c. 387, s. 7.

³⁷See Chapter 48 *infra*.

vehicle while detained are a lien on the motor vehicle which may be enforced in the same manner as provided by section 48 of the Mechanics' Lien Act.³⁸

This power of seizure and detention is unnecessarily wide. There are cases where the police should be allowed to detain a motor vehicle if it would be dangerous to permit it to be on the highway, or where it may be necessary to examine it or produce it for evidenciary purposes. Apart from these cases there should be no power of seizure and detention, much less the right to charge the owner with the expense of unnecessary and unwarranted detention.

We have already discussed the right of seizure under the Game and Fish Act. Very extensive rights of seizure that previously existed under the Liquor Control Act were repealed in 1965.³⁹

RECOMMENDATIONS

1. In no case should power to create offences for which a person may be arrested without a warrant be delegated to the Lieutenant Governor in Council, a Minister or any other body.
2. Powers of arresting without a warrant under the Highway Traffic Act should be restricted to those cases where there is a failure on the part of a driver of a motor vehicle to identify himself and the owner of the vehicle, without reasonable cause being shown, and where the driver has no legal right to have the motor vehicle on the highway.
3. There should be no power to arrest without a warrant under the Liquor Control Act, except where a peace officer finds a person committing an offence and that person refuses to give his name and address, or where there are reasonable grounds to believe that the person will not be found at the address given or in the case of drunkenness, where it is necessary to protect the person from injury or injuring others.

³⁸Highway Traffic Act, R.S.O. 1960, c. 172, s. 156.

³⁹Ont. 1965, c. 58, ss. 50, 69. Powers of search and seizure are discussed in other aspects in Chapter 31 *supra*.

4. A system should be devised whereby persons resident outside of Ontario should have the opportunity to pay money to a peace officer as security for their attendance in court, this sum to be applied to any fine that may be levied when the case comes before the court. This procedure would apply only to offences under the Highway Traffic Act, the Liquor Control Act and the Game and Fish Act. In such cases a precise statement should be sent to the accused to show how the money has been applied.
5. Warrants should not be issued for offences under the provincial law, except where it can be shown that the accused is in hiding or cannot be found.
6. Where a warrant is applied for, the information should clearly state the grounds on which it is believed that a summons will not be effective.
7. A warrant should never be issued, unless it is shown that a summons would not likely be effective.

CHAPTER 48

Bail Procedure

IN Chapter 47 we discussed the alternative methods of securing the attendance of the accused before the court. We emphasize here that apart from those cases where an arrest is necessary to prevent the accused from harming himself or others, or repeating his offence, an arrest ought not to be made except in cases where the circumstances are such that a reasonable man would have good ground to doubt that a summons would not procure the attendance of the accused before the court. It is only when an arrest has been made that the question of release on bail arises. Under our law as it now is, when a person is arrested there are only two courses open. He must remain in custody until his trial is completed, or he may be released on bail upon entering into a recognizance, with or without sureties, pending his trial. There is no third course of an informal release on notice to appear, to which we alluded in Chapter 47.¹ This we shall discuss later.

When an application is made for the release of a person on bail at any time, the judicial officer before whom the application is made must answer two questions:

- (1) What is the purpose of bail?
- (2) Is this a proper case for bail?

No general answer can be given to the first question. The answer must depend on the circumstances of each case. It may be argued that on a strict application of legal principles there are few cases where an accused person is not entitled to be released on bail on some reasonable terms. He is presumed to be innocent until he is proven guilty, but good sense tells

¹See p. 740 *supra*.

us that there are cases where no order for bail should be made. In such cases the amount of bail and the conditions of the bond do not arise for consideration. These cases cannot be catalogued. Where the facts surrounding the offence are such as to demonstrate to a reasonable man, acting judicially, that it would be against the public interest or the interest of the accused that he be at large pending his trial, he should be kept in custody. When these cases arise an order refusing bail is always open to review from time to time by a Supreme Court judge.^{1a} No order fixing or refusing bail is ever final.

What concerns us here is the procedure in those cases where an order for bail in some form and some amount should be made. In these cases the purpose of bail and the principles to be applied in making an order always arise. The purpose of bail is to permit the accused to be at large pending his trial, and to provide an assurance that he will be present when called upon for trial. The principles to be applied in making an order are concisely, if not exhaustively, stated in a passage from Kenny:

“The Bill of Rights forbids the requiring of ‘excessive’ bail; but justices must use their own judgment as to what sum is adequate without being excessive. Here, as also in exercising their discretion about admitting to bail at all, they have simply to consider what likelihood there is of the defendant’s failing to appear for trial. That likelihood will be affected by (1) the gravity of the charge, (2) the cogency of the evidence, (3) the wealth of the offender (which renders him both more willing to bear the forfeiture of bail and less willing to bear the disgrace of a conviction), (4) the consideration whether the proposed sureties are independent or are likely to have been indemnified by the accused, and (5) the probability of the accused’s tampering with the Crown witnesses, if he be at large.”²

The predominant consideration should be the order necessary to give reasonable assurance that the accused will appear for trial when called on. The application of these principles may arise at any one of the four stages of criminal proceedings:

- (a) Before arraignment;

¹ *Crim. Code*, s. 465.

² Kenny, *Outlines of Criminal Law* (10th ed.), 481.

- (b) On arraignment;
- (c) On committal for trial;
- (d) On appeal
 - (i) from a conviction for an indictable offence;
 - (ii) from a conviction for a summary offence.

BAIL BEFORE ARRAIGNMENT

There appears to be a widespread indifference to the injustice done to accused persons by reason of unnecessary incarceration pending arraignment. The injustice is demonstrated by a study made by Professor Friedland of those admitted to bail before arraignment, and those admitted to bail on arraignment, in the City of Metropolitan Toronto.³ Of the group studied, ninety-two per cent of those charged with criminal offences were originally arrested. Of this percentage, only twelve per cent were bailed from the police stations. An additional four per cent were released from the jail on Sunday afternoons. The study shows that eighty-four per cent of all persons arrested for criminal offences remained in custody until their first court appearance. If all charges under the Criminal Code, whether instituted by an arrest or the issue of a summons, are included, seventy-seven per cent of all persons charged with criminal offences were kept in police custody until their first appearance in court.⁴

Two fundamental difficulties lie in the way of developing a good bail procedure:

- (1) Too strict adherence to a system that was developed in the early history of the Province.
- (2) Geographical hindrances.

The former can be overcome to a considerable extent, and in fact has been modified in a limited way, by the provisions of section 15 of the Summary Convictions Act,⁵ but geographical difficulties are real obstacles in the way of even justice for all.

³Friedland, *Detention Before Trial* (1965).

⁴*Ibid.*, 46.

⁵R.S.O. 1960, c. 87, s. 15, as amended by Ont. 1966, c. 149, s. 2. See also Chapter 47 *supra*.

The procedure with respect to bail is the same whether the offence be one punishable on indictment or summary conviction.⁶ Except as modified by section 15 of the Summary Convictions Act, all provincial offences are controlled by this procedure.⁷ Upon arrest the accused must be taken before a justice ("justice" means a justice of the peace or magistrate⁸) within twenty-four hours, except where a justice is not available within that period. In such cases the accused must be taken before a justice as soon as possible,⁹ but an order for bail may be made in the meantime if a justice is available. In metropolitan areas, magistrates' courts sit daily except Sunday. In other areas daily courts are neither necessary nor practical, but in most areas it is not unreasonable that a justice of the peace should be available to hear applications for bail promptly.

We think that a new procedure, applicable to all provincial offences, should be adopted.

Where a person has been arrested on a charge against the laws of Ontario, and a police officer in charge of the accused has no good reason to believe that the accused would not appear in answer to a summons, the officer should have power to serve a notice on the accused to appear before a justice at a time and place fixed in the notice, and thereupon the accused should be released from custody. Provision should be made that failure to appear would be an offence for which the accused may be arrested, with or without a warrant, and for a penalty for failure to appear. The form of the notice should state clearly the consequences of failure to appear. At the public hearings, we suggested the adoption of some such form of notice and the suggestion received the approval of very responsible police officers. Assistant Commissioner Bird said:

"What you suggest is a very modern and humane way of dealing with the problem that happens every day and other typical offences be they under the Criminal Code or the Statutes. Late at night and holidays and weekends a Justice of the Peace is not available and it means a worthwhile citizen who has transgressed on this occasion, one of these typical offences,

⁶Crim. Code, s. 700(1).

⁷See p. 728 *supra*.

⁸Crim. Code, s. 2(21).

⁹*Ibid.*, s. 438(2).

remains in jail over the week-end and does not appear for work on Monday and may lose his employment, and his family suffer, and so on. A personal recognizance based on a penalty in addition to the offence would only require his appearance. This by-passes the Justices of the Peace system. I think what you suggest is a very modern and reasonable way of dealing with appearance. I think this would apply in ninety-five or ninety-six per cent of the cases we handle. The other three or four per cent who are transients and have no fixed ties would run out. Even those who are on bail and jump bail, and so on, we lose those. I think that would be a much fairer way of treating a man with reference to his employment, his reputation, his character, his dignity, and so on. I see nothing objectionable to that."

If this recommendation were adopted, many of the injustices arising out of detention before arraignment would be eliminated.

ORDER FOR BAIL

An order for bail may take one of three forms:

- (a) A recognizance, conditioned on the appearance of the accused as specified, with sureties;
- (b) A recognizance entered into by the accused without sureties, but accompanied by a cash deposit;
- (c) A recognizance entered into by the accused without a cash deposit.

An order for bail prior to arraignment, conditioned on the deposit of cash, in most cases is a meaningless order as it is made at a time when banks are closed. Few people carry substantial sums on their persons.

An accused person or his or her spouse should be permitted to pledge the family home for his or her appearance for trial. It is not the function of the court or the authorities to assume the role of paternalistic guardians of property interests.

In England, security in advance is not required. The accused is released on his own recognizance, with or without surety. The surety undertakes to pay a designated sum if the accused does not appear according to the terms of the

bond. The result is that persons who have been granted bail will not be kept in custody because they are unable to raise a cash deposit in advance.¹⁰ In addition, the police must grant bail, if the offence is not a serious one, where for any reason it is not possible to bring the accused before a magistrate within twenty-four hours of his arrest.¹¹

In our practice, the amount of money required to be posted in advance as security for future appearance in court is often out of all proportion to the gravity of the offence. It is not unusual that sums greatly in excess of any penalty that would probably be imposed are required. The result is that accused persons who cannot raise bail money are imprisoned not for the offence they have committed but because of mere inconvenience, or because they are poor, notwithstanding that the punishment which may be imposed by the court for the offence committed may be very trivial.

An attempt has been made by provincial legislation to mitigate some of the hardships that arise out of the bail procedure, in so far as provincial offences are concerned. Under the Summary Convictions Act,¹² where a person who has been arrested, with or without a warrant, for a provincial offence, is brought into a police station, the police officer in charge, if he thinks the case a proper one, may take bail from such person by recognizance conditioned for his appearance within two days before the magistrate or other justice at the time and place therein mentioned.

The language of this section is unusual. The words "take bail" may have a popular meaning but they are a departure from the language of the Criminal Code. In practice the section has been interpreted to mean that it requires the deposit of cash in advance.

As a result of questionnaires submitted to the police forces in the Province, it appears that the section is not used generally, and where it is, its uses are restricted to those cases in which the charge arises out of a breach of the Liquor Control Act or a breach of the Highway Traffic Act.

¹⁰Jackson, *The Machinery of Justice in England* (1964), 133.

¹¹Magistrates' Courts Act, 1952, 15 & 16 Geo. VI and 1 Eliz. II, c. 55, s. 38(1).

¹²R.S.O. 1960, c. 387, s. 15, as amended by Ont. 1966, c. 149, s. 2.

A practice is said to have grown up in some places in Ontario to discourage the acceptance of real property as security on a bail bond. It is said that where real property is offered as security, the crown attorney or the justice normally will require a registrar's abstract or certificate of title, and in addition may require a certificate of valuation, mortgage statement, receipted tax bills and a sheriff's certificate. If such a practice exists it is legalistic nonsense. In most cases a very simple examination of the surety will disclose whether he has sufficient interest in the property in question to justify his suretyship. Road blocks ought not to be put in the way of the pledging of real property by sureties, thereby promoting a system of cash bail. Your Commissioner practised when cash bail was treated as a last resort. It was thought to be the most undesirable form of suretyship for many good reasons which are still valid:

(1) It is discriminatory. The ordinary man has many friends who may own real property which they are willing to pledge as surety for his appearance at his trial, but few will have one, two or three thousand dollars that they can deposit with the court. The result is that the rich man is released and the poor man remains in custody.

(2) The system of cash bail promotes the activities of the professional bondsman, a polluting influence in the administration of justice; or in the alternative it promotes the activities of the money lender and the accused is required to pledge the resources of his wife and family on usurious terms.

It is an offence under the Criminal Code for a bondsman to accept or to agree to accept an indemnity in whole or in part from a person who is released or is to be released from custody under recognizance.¹³ It is, however, no offence for anyone to lend money to an accused to deposit as bail for a stipulated consideration, paid in advance, and at the same time to take an assignment of the bail money deposited with the court. In these cases the money-lender gets paid in advance and he has full security for his own loan, while the unfortunate accused is mulct because he is poor or because the justice will not approve of property bail.

¹³Crim. Code, s. 119(2)(e).

Our recommendations with respect to bail procedure before arraignment must be considered together with the recommendations contained in Chapter 47 regarding the greater use of the summons.

RECOMMENDATIONS

With respect to persons arrested for breaches of provincial law, we recommend that:

- (1) Police officers should be authorized by legislation in proper form to release arrested persons upon service upon them of a notice to appear in answer to the charge for which they have been arrested.
- (2) Arrested persons should be released on their own recognizance, where bail is thought necessary, unless it can be clearly demonstrated that injury to the accused person or other persons will likely follow.
- (3) Sureties and the deposit of money as security for the appearance of the accused should only be required in exceptional cases.
- (4) Arrested persons should be permitted to pledge their own real property as security, or real property in which they have an interest, without legalistic technicalities being observed.
- (5) It should be made an offence to fail to appear in response to a notice to appear, or pursuant to a recognizance.

With respect to offences under the Criminal Code, we recommend:

- (1) A complete reorganization of the disposition of justices of the peace and the allocation of duties should be undertaken so that there will be a minimum of delay in securing bail pending arraignment.¹⁴
- (2) Legalistic technicality in the approval of property bail should be abandoned. Hundreds should not be made to suffer because of the risk of an occasional fraud.
- (3) Representations should be made to the Federal Government to adopt the procedure we recommend in this chapter

¹⁴For a discussion of justices of the peace, see Chapter 38 *supra*.

for release by police officers of those charged with minor offences, upon service of a notice to appear for trial.

(4) Failure to appear pursuant to a notice, as recommended in the preceding paragraph, should be included as an offence under section 125 of the Criminal Code.

BAIL ON ARRAIGNMENT

The principles to be applied where an application for bail is made on arraignment differ little from those where the application is made before arraignment. On arraignment there is a fuller opportunity to investigate all the circumstances of the accused and the nature of the offence. The crown attorney is present on this occasion and the accused may be represented by counsel. The matter of what order for bail should be made is for the judicial decision of the justice. The studies conducted by Professor Friedland would indicate that in a large metropolitan area, such as the City of Toronto, grave injustice is done to accused persons on a very wide scale by reason of what could only be termed a perfunctory way of dealing with applications for bail in the first instance. A study of 136 cases disposed of in a week showed that in one-third of the cases coming before the Toronto magistrates' courts, the bail set in the first instance was later reduced or entirely cancelled.¹⁵

BAIL ON COMMITTAL

An application for bail on committal for trial can be disposed of with much more understanding than earlier applications following arrest. The magistrate knows the nature of the case against the accused. He can weigh, and should weigh, the likelihood of the accused's absconding to avoid trial. When there is little likelihood that the accused will not appear to stand his trial, there is no reason why the requirements for bail should not be at a minimum. While this is a matter for judicial decision, it is the function of the crown attorney to see that proper representations are made to the committing magistrate to assure as far as possible that accused persons are not unnecessarily kept in custody pending trial.

¹⁵Friedland, *Detention Before Trial* (1965), 147.

BAIL ON APPEAL

The matter of bail on appeal is quite a different problem from an application made at an earlier stage in the proceedings. The accused has been convicted and sentenced.

Bail on Conviction for an Indictable Offence

An application for bail pending an appeal, following a conviction for an indictable offence, is heard by the Chief Justice of Ontario, the acting Chief Justice or a judge designated by him. The relevant practice and procedure are laid down by the laws of Canada. A system, however, should be established under which every appeal from a conviction on indictment should be investigated by the Attorney General to determine whether the accused ought not to be admitted to bail pending the hearing of the appeal. Mr. J. P. Giffen, a member of the Ontario Bar, drew to the attention of the Commission a case in which the accused was convicted on April 7, 1964, on a charge of theft. He was remanded until May 5 for sentence. He was on bail on his own recognizance until May 5, when he was sentenced to the reformatory for six months definite and six months indefinite. On May 11 the accused appealed in writing to the Court of Appeal on a question of law. It was directed by the Court of Appeal that a transcript of the evidence would be required and the request was passed to the Attorney General's Department. A transcript of the evidence was provided, legal aid counsel was retained on October 19, and on November 3 the appeal was heard. On October 9 the accused had been released on parole after serving five months and four days of his sentence. On November 3 the Court of Appeal quashed the conviction and ordered a verdict of acquittal.

With the adoption of a proper legal aid system, such a case as this may seldom arise, but it does demonstrate that there should be someone responsible to consider whether an application for bail ought not to be made at an early stage in all appeals from conviction on indictment.

Bail on Appeal from a Conviction for a Summary Offence

The procedure with respect to appeals for offences against the laws of Ontario is governed by Part XXIV of the Criminal

Code, particularly sections 719 and following. Special reference should be made to section 724. Where an appeal is from a conviction imposing imprisonment without the option of a fine, the appellant shall remain in custody or enter into a recognizance. Where the appeal is from a conviction or order adjudging that a fine or a sum of money be paid, and imposing a term of imprisonment in default of payment, the appellant shall either remain in custody until the appeal is heard or deposit with the summary conviction court an amount of the fine or sum of money to be paid, and an additional sum that in the opinion of the summary conviction court is sufficient to cover costs of the appeal. If no term of imprisonment is imposed as an alternative, the appellant must either enter into a recognizance or deposit a security for the amount of the penalty and costs.

As applied to offences against the laws of the Province these provisions are harsh and unjust. The appellant is required not only to give security for the payment of the penalty imposed, but also for the costs of the appeal, before he can exercise his right to appeal to set aside a conviction that he contends is illegal or without foundation. No such obstacles are thrown in the way of those convicted for indictable offences. Not only do they not have to give security for any penalty that may be imposed, but they do not have to give security for costs, and costs are not levied against unsuccessful appellants in such cases. Even in civil cases, where no question of the liberty of the subject is involved, the appellant is not required to post security for the judgment, nor costs of the appeal, as a condition precedent to the exercise of his right of appeal.

The best safeguard protecting the rights of the individual in the courts is a free and unimpeded right of appeal with no technical impediments.

We recommend that the Summary Convictions Act be amended to permit an appeal from all convictions for offences under Ontario statutes, upon the mere serving and filing of a notice of appeal, setting out the grounds of appeal, without any sureties for payment of monetary sums or costs.

In those cases where imprisonment is imposed without the option of a fine, provision should be made for release on

bail without sureties, pending the hearing of an appeal unless the necessity for sureties has been demonstrated. A bond for security for costs should not be required. Simple and expeditious rules of procedure should be devised so that the appeal will not fail by reason of some procedural defect in the proceedings taken.¹⁶

RECOMMENDATIONS

1. Greater consideration than is now given to it should be given to the granting of bail on arraignment and its amount.
2. Where there is little likelihood that the accused will not appear to stand his trial, the requirements of bail should be kept to a minimum.
3. A system should be established under which every appeal from a conviction on indictment should be investigated by the Attorney General to determine whether the convicted person ought not to be admitted to bail pending the hearing of the appeal.
4. The Summary Convictions Act should be amended to permit an appeal from all convictions for offences under Ontario statutes, upon the mere serving and filing of a notice of appeal without any sureties for payment of monetary sums or costs.
5. In those cases where imprisonment is imposed without the option of a fine, provision should be made for release on bail without sureties pending the hearing of an appeal unless the need for sureties has been demonstrated and no bond for security for costs should be required.
6. Simple and expeditious rules of procedure should be devised so that an appeal will not fail by reason of some procedural defect in the proceedings taken.

¹⁶This will be discussed further in Chapter 51 *infra*.

CHAPTER 49

Publication of Proceedings Before Trial

REPRESENTATIONS were made to the Commission that legislation should be passed prohibiting news media from reporting the evidence given at preliminary inquiries, except in those cases where the accused is discharged at the preliminary inquiry or after the conclusion of the trial.

Some doubt arises in the mind of your Commissioner as to whether this subject matter is within the Terms of Reference. The question of whether the Province could pass legislation of the character suggested raises very definite constitutional problems. There is, however, no doubt in our mind as to the power of the Province to take some of the remedial steps we recommend.

THE PRELIMINARY INQUIRY

Where a person is charged with an indictable offence¹ he has a right to be tried, if he so elects, by a magistrate or by a judge without a jury. If he does not elect either trial by a magistrate or by a judge, he must be tried by a jury consisting of 12 jurors whose verdict must be unanimous. In all cases where the accused does not elect to be tried by a magistrate, a preliminary inquiry must be held by a justice.^{1a}

The function of the justice is to take evidence under oath and determine if there is sufficient evidence to put the accused

¹Except an offence over which a magistrate has absolute jurisdiction (Crim. Code, s. 450) and an offence within the absolute jurisdiction of a superior court (Crim. Code, s. 413).

^{1a}By a justice of the peace or a magistrate: Crim. Code ss. 449, 2 (21).

on his trial. It is unnecessary to go into the details of the procedure before the justice other than to say that full examination and cross-examination of witnesses is permitted, but the Crown is not required to produce all the available evidence against the accused. A statement of evidence not produced at the preliminary inquiry should be made available to the accused, although there is no legal requirement that this be done.

PRESENT LAW

A prosecutor may present as evidence at the preliminary inquiry "any admission, confession or statement made at any time by the accused that by law is admissible against him".² The publication by any newspaper, or by broadcast, of a report of any admission or confession tendered in evidence at a preliminary inquiry, or a report of the nature of such admission or confession so tendered in evidence, is prohibited, unless:

- (a) The accused is discharged at the preliminary inquiry;
- (b) The accused, having been committed for trial, the trial is ended.³

The term newspaper is given a very wide definition.⁴

Where it appears to a justice that the ends of justice will be best served by so doing, he has a discretion to order that no person, other than the prosecutor, the accused and their counsel, shall have access to or remain in the room in which the inquiry is held, and to regulate the course of the inquiry in any way that appears to him to be desirable and not inconsistent with the provisions of the Criminal Code.⁵

TUCKER COMMITTEE

A Committee was appointed in 1957 in England, under the chairmanship of the Right Honourable Lord Tucker, "to consider whether the proceedings before examining jus-

²*Ibid.*, s. 455(1).

³*Ibid.*, s. 455(2).

⁴*Ibid.*, ss. 455(3), 247.

⁵*Ibid.*, s. 451 (j) (k).

tices should continue to take place in open court and if so whether it is necessary or desirable that any restriction should be placed on the publication of reports of such proceedings". The Committee, which consisted of twelve distinguished members, reported in July of 1958.⁶

The Committee was neither in favour of any extension of the right of examining justices to sit *in camera*, nor that they should be encouraged to make even minor increases in the use of their existing power to do so.⁷

The Committee recommended "that unless the accused has been discharged or until the trial has ended any report of committal proceedings should be restricted to particulars of the name of the accused, the charge, the decision of the court and the like". The Committee further recommended "that the present general discretion given to examining justices to sit *in camera* should be replaced by a new statutory power limited to those cases, or parts of cases, where notwithstanding the restriction on reporting, the ends of justice would not be served unless the proceedings were held *in camera*".^{7a}

In its reasons for coming to these conclusions, the Tucker Committee relied on certain factors that do not exist in Canada:

1. It stated that the evidence given at committal proceedings may include evidence not given at the trial or excluded at the trial. "This may include confessions by the accused or evidence of system which may include evidence of other offences." This is in part true in Canada, but there is the prohibition in this country on publication of confessions or admissions until the evidence is given in the presence of the judge or jury at the trial.

2. The Committee stressed the injury that may be done by the publication of the content of the opening speech of counsel for the prosecution. In England much stress is put on the opening speech of counsel. In Ontario it is very rare

⁶Report of the Departmental Committee on Proceedings before Examining Justices (1958), Cmnd. 479.

⁷*Ibid.*, 23-4. In England, the Magistrates' Courts Act, 1952, 15 & 16 Geo. VI and 1 Eliz. II, c. 55, s. 4(2) provides that the justices presiding at a preliminary inquiry shall not be obliged to sit in open court.

^{7a}*Ibid.*, 24.

that counsel for the Crown makes an opening speech at a preliminary hearing.

3. In England committal proceedings are usually conducted before one or more laymen of the thousand petty sessional divisions. In Ontario the committal proceedings are usually presided over by magistrates who are in most cases qualified lawyers, and, if the recommendations contained in this Report are adopted, they will in due course all be qualified lawyers.

The report of the Tucker Committee has been implemented in England.^{7b} We shall discuss later the extent to which its recommendations should be adopted in Ontario.

PROCEDURE IN SCOTLAND

Preliminary inquiries are not held in Scotland. The decision as to whether a person shall be tried for an indictable offence is made by the Lord Advocate (the Chief Crown Prosecutor) who exercises control over all prosecutions through crown counsel—the Solicitor General and four advocates depute appointed by him. The powers and duties of the Lord Advocate in relation to criminal proceedings are exercised through the Crown Office in Edinburgh. Cases are prosecuted at trial in the sheriff's court by the procurator fiscal (commonly referred to as the fiscal) for the district. These officers are appointed by, and under the instructions of, the Lord Advocate. Except for nomenclature, the system of county crown attorneys in the Province of Ontario, appointed and operating under the direction of the Attorney General, is not dissimilar to the Scottish system.

Except in minor cases, the Lord Advocate makes the decision whether or not to prosecute. The procurator fiscal takes statements of the evidence to be given by the witnesses for the Crown. These statements are called precognitions. The witnesses are precognosced privately and separately in the absence of the accused. When the indictment is served on the accused, a list of the names and addresses of the witnesses is attached to it, together with a list of documents and articles which are to be produced at the trial. The defence is then entitled to

^{7b}Criminal Justice Act, 1967, 15 & 16 Eliz. II, c. 80, s. 3.

precognosce the crown witnesses. The defence is required to give written notice of the witnesses it proposes to call and of any documents to be produced; the prosecutor is entitled to precognosce the defence witnesses. There is no opening speech for the prosecutor at the trial.⁸

Under this system there is no evidence tendered in a court of any kind until the trial, and hence no publication of any evidence or allegations against the accused other than the formal charge.

PROCEDURE IN NORTHERN IRELAND

The procedure in Northern Ireland was the same as that in England until 1953, when the Summary Jurisdiction Act⁹ was passed. That Act provided:

"42. (1) Where on the preliminary investigation of an indictable offence an opening statement is made on behalf of the prosecution, such statement shall not be printed or published.

(2) Where on the preliminary investigation of an indictable offence objection is taken to the admissibility of any evidence or part of evidence, the presiding magistrate or justice of the peace may, if satisfied that such objection is made in good faith, make an order that such evidence or part of evidence and any discussion relating thereto shall not be printed or published and, if on any such investigation it appears to the presiding magistrate or justice of the peace that publication of any part of parts of evidence adduced before him (whether or not any such objection has been made thereto) would prejudice the trial of the accused, he may make an order that such part or parts of evidence shall not be printed or published.

(3) Any person who acts in contravention of the provisions of sub-section (1) of this section or of any order made under sub-section (2) of this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine."¹⁰

The Tucker Report shows that out of 3,701 cases committed for trial in about four years, in only 137 cases was a

⁸Report of the Departmental Committee on Proceedings before Examining Justices (1958), Cmnd. 479, 8.

⁹Summary Jurisdiction Act (Northern Ireland), 1953, c. 3.

¹⁰*Ibid.*, s. 42.

restriction order asked for, and in 133 cases the order was granted. It is stated that the Act appears to be working satisfactorily in Northern Ireland.

VIEWS OF THE PRESS

In order to get the views of a representative section of the press in Ontario, Counsel for your Commission wrote to forty-six daily newspapers in the Province and to the Canadian Press, conveying to them the substance of the recommendations that had been made to this Commission and by the Tucker Committee. Comments and recommendations were invited. Twelve newspapers and the Canadian Press replied. Four of those responding to our invitation were in favour of legislation restricting publication of evidence given at a preliminary inquiry, and nine were against any restrictive legislation. If one is to measure the attitude of the press by the degree of indifference shown by the thirty-four daily newspapers that did not respond to our inquiry, one may assume that the vast majority of the press is not much concerned about the matter. The opinion and rights of the press are relevant, but they are by no means decisive. The rights of accused persons and the members of the public are the vital matters.

VIEWS IN FAVOUR OF RESTRICTIVE LEGISLATION

Those who submitted briefs to the Commission, and members of the press who responded to our invitation to comment on the subject, who were in favour of restrictive legislation mainly relied on a fundamental principle of our system of administering justice: that an accused person is entitled to a fair trial free from preconceived prejudice.

The Tucker Committee summarized the view of those opposing publication of evidence given at preliminary inquiries as follows:

“(a) There is a risk of a jury’s verdict being affected as a result of prejudice arising from a report of committal proceedings. Such prejudice can arise both from a report of

evidence or allegations which are not repeated at the trial and from the inevitably one-sided character of a report which appears complete in itself but in fact contains only the evidence on behalf of the prosecution.

(b) A considerable section of the public believes that juries are so influenced and that justice is endangered by a system which results in the publication of such reports.

(c) The present system tends to produce unbalanced reporting. In the period between the committal proceedings and the trial, which may be one of up to three months, only the prosecution's case, sometimes very fully reported, is normally before the public, many of whom do not distinguish clearly between committal for trial and conviction. If the accused is acquitted at the trial, his acquittal may receive little or no publicity. Whether he is acquitted or convicted, the sum result can be that everything that tells against him is published twice and what is in his favour only once.

(d) Publication of reports of committal proceedings serves no useful purpose."¹¹

This summary comprehends all the submissions in favour of restrictive legislation which were made to this Commission.

VIEWS OF THOSE OPPOSED TO RESTRICTIVE LEGISLATION

Those opposed to restrictive legislation base their arguments mainly on the right of the public to know. This right involves the freedom of the press, not only secured by the Canadian Bill of Rights, but to some extent by judicial decision.¹² It is argued that a justice, while conducting a preliminary hearing, is sitting in a criminal court and that within certain accepted limitations the criminal law should be administered in public. Since the members of the public as a body cannot attend in the courts, they must rely on the news media for their knowledge of what goes on there.

¹¹Report of the Departmental Committee on Proceedings before Examining Justices (1958), Comnd. 479, 9-10.

¹²*Re Alberta Statutes*, [1938] S.C.R. 100, 133.

One presentation made to the Commission put it this way. "If there is any conflict between the citizen's right to a fair trial by an impartial jury and the right of the public to know what goes on in the courts, then press freedom is the basic liberty that has to take precedence. The integrity of the courts, which is not being questioned here in any way, and the administration of justice depend on the basic condition that the public shall know what is going on in the courts and how the police and legal profession are conducting themselves. If it is impossible for justice to be done in an open court, our system will have to be re-examined, but the suppression of court and crime news will not improve the situation.

We cannot agree with this statement in its entirety. In our view the right of accused persons to be assured a fair trial must predominate in our system of administering justice. The means by which that right is to be secured is the essential matter.

INDEPENDENCE OF THE COURTS

We start with the independence of the courts of justice. They must not be controlled by any method of supervision or direction from political authority. Once the courts surrender any measure of their independence to state supervision, the road to dictatorship and tyranny is opened and civil rights may ultimately become something of minor importance. A court, to be independent, must be a public court and one responsible to the public alone. Not only is it important for the public to know what is done, but it is equally important that the public should know *how* things are done in courts of justice. Not only is the public concerned with the way in which things are done in a particular case, but the rights of all citizens are affected by the way they may be done in future cases.

Restriction on the fair publication of proceedings at preliminary inquiries would in large measure remove from this branch of the administration of justice an essential safeguard of civil rights—the right of the public to know, to criticize and to debate. It is in light of this that the risk of unfair trials of accused persons must be examined.

RISK OF PREJUDICE

The risk of prejudice only arises in those cases where the accused is tried by a jury. As we have stated elsewhere, 95% of those charged with indictable offences in 1965 were tried by magistrates, (52% on election and 43% in exercise of absolute jurisdiction), 2.3% by county or district court judges without a jury, and 2.7% by a jury.

The risk is that wide publication of the evidence given at a preliminary inquiry may so influence the minds of prospective jurors that they will approach their duties with conscious or unconscious bias against the accused, or that the public mind in the community will be so aroused that members of a trial jury will be intimidated by the force of public opinion. We have grave doubts that this is a real risk. In the first place, at the time of a preliminary inquiry no one, including the jurors, knows who the jurors at the trial will be. In metropolitan areas the public memory is very short and individuals are largely anonymous. Few members of the public can remember what they have read or heard about a particular case for many days, let alone months. In less populous areas gossip and rumour spread more easily, but gossip and rumour thrive on secrecy. It is much more likely that vicious and inaccurate gossip and rumour will be spread throughout a community by individuals who claim to have knowledge than by a fair and accurate report by news media.

Even if news media were prohibited from the publication of proceedings at preliminary inquiries, in the less densely populated areas those permitted to attend in court would nevertheless give wide publication if the trials were of great public interest. Such publication would be much less accurate and much harder to control than publication in the ordinary channels. In addition, gossip would give the proceedings a news value that they would not otherwise have.

SAFEGUARDS

As against the risks of prejudice that may now exist, it is useful to examine the present safeguards. In this Province there are twelve jurors in all criminal cases tried by jury. They are selected by lot from a panel consisting of about

sixty or more jurors, which has likewise been chosen by lot. In a case of great importance and public interest the panel is usually larger. If an offence is punishable with death, the accused has twenty peremptory challenges, that is, without assigning any reason; where the offence is not punishable with death but the punishment may be imprisonment for more than five years, the accused has twelve peremptory challenges; in other cases, the accused has four peremptory challenges.¹³

In addition, the accused is entitled to challenge any number of jurors on the ground that the "juror is not indifferent between the Queen and the accused".¹⁴ This is a right that is frequently exercised in our courts. In such cases, the prospective juror may be, and usually is, examined under oath as to his previous knowledge of the case, what he has read about it, and whether he feels that he can give a true verdict based on the evidence. Two triers are selected for the purpose of determining whether the juror "stands indifferent". This procedure is a very real safeguard.

When jurors are selected they are required to take an oath "to give a true verdict according to the evidence". Judges in charging juries invariably caution them to put out of their minds anything they have learned about the case, except that which is revealed in the evidence. Nothing has been brought to the attention of this Commission to suggest that jurors do not take their oaths seriously. If jurors cannot be depended upon to adhere to their oaths as jurymen, the whole jury system loses its fundamental strength as a protection of the rights of the individual.

The requirement that the verdict of a jury must be unanimous constitutes a very real safeguard against bias or prejudice. There may be some risk that one or two jurors may allow their preconceived notions to deflect them from the requirement of their oaths as jurymen, but that twelve jurors will all be derelict to the sanctity of their oaths is very remote.

The law of contempt of court gives the accused in this Province a considerable protection against unfair reporting.

¹³Crim. Code, s. 542.

¹⁴*Ibid.*, s. 547 (b)

Judges have taken a stern view of lurid, inaccurate or inflammatory reporting, and have suppressed comment on evidence until a final verdict is given. Where there has been unfairness, exemplary punishment has followed. The responsible press has supported the courts in their efforts to make the law of contempt of court function as an effective protection of the right of the individual to a fair trial.

We have come to the conclusion that the fundamental principle that the courts of justice should be open to the public not only in name, but in reality is essential to a free society. To preserve the openness of the courts, the news media must be permitted to carry to the public what goes on in the courts. Justice administered under public and fair scrutiny will be better justice, whether it is at a preliminary inquiry or at a trial, and confidence in its administration will be enhanced if justice in all its stages is administered openly, subject to the exceptions now recognized by law.

ADDITIONAL SAFEGUARDS

In order to remove any ground for suggestion that there may be a pretrial prejudice carried into the trial of accused persons, some additional safeguards may be provided. A court at which, or before which, an accused may be indicted, or a judge who may preside at that trial, may on the application of the prosecutor or of the accused order that the trial may be held in any other county or district in the Province, if it is expedient to the ends of justice.¹⁵ This is a very wide power which could be exercised wherever it is felt there exists widespread local prejudice, conscious or unconscious.

One difficulty arises in the exercise of the power to make an order changing the venue of a trial. In many respects the counties are concerned with the costs of administering justice in their respective localities. If a trial is transferred from one county to another, the county to which it is transferred has to pay the costs of the trial. In order to compensate for this additional expense, the county from which the trial has been transferred is required to pay the county in which the trial is

¹⁵*Ibid.*, s. 508.

to be held all additional expenses that the latter county incurs by reason of the change of venue, if the order changing the venue is on "the ground that a fair trial cannot be had" in the county from which the trial was transferred.¹⁶ The wording of the provincial statute is very different from that of the Criminal Code. In order to bring the case within the provincial statute, it must be established that "a fair trial cannot be had in the county in which the proceedings were commenced". That is a very heavy onus to discharge. Under the Criminal Code a change of venue may be ordered merely upon its being made to appear that it is "expedient to the ends of justice". This is a quite different standard from that set under the provincial legislation.

If the recommendations contained in Section 5 of this Part are adopted, trials may be moved freely from one county to another as the ends of justice may dictate. This we think should be done.

It is usual in this Province that preliminary inquiries are conducted by magistrates, but in some cases they may be conducted by justices of the peace. We recommend that the administrative arrangements of the courts should be such that magistrates should preside at all preliminary inquiries, except where the accused may consent to proceeding before a justice of the peace.

Crown counsel should be instructed to refrain from presenting evidence at a preliminary hearing that may be inflammatory, unless that evidence is essential for committal to trial. On the other hand, all evidence that is likely to be used at the trial should be made known to the defence.

As we have indicated, the law of contempt of court is a vital safeguard to the right of the accused to a fair trial. It is a law that is of little value as a safeguard unless it is enforced. A prosecution for contempt of court may be commenced in four ways:

- (1) A summary application may be made on behalf of the Crown for an order to commit for contempt of court.

¹⁶Judicature Act, R.S.O. 1960, c. 197, s. 60. See also Administration of Justice Expenses Act, R.S.O. 1960, c. 5, s. 20.

- (2) The Attorney General may proceed by way of indictment against the alleged offender.
- (3) A summary application may be made on behalf of the accused for an order for committal.
- (4) The court of its own motion may direct the alleged offender to appear and show cause why he should not be committed.

In England it is usual for the Attorney General to institute the proceedings and, in the past, Attorneys General there have been vigilant to protect the rights of accused persons against the wrongful publication of matters that may tend to prejudice their fair trial. This has not been the case in Ontario. The proceedings that have been taken have either been at the instance of the court or of the accused. More often it has been at the instance of the court. Frequently counsel for accused persons are fearful of vindictive retaliation by the press in the subsequent reporting of cases, if they institute a motion for committal. This fear, which we hope is entirely without foundation, does exist.

The courts should not be called upon to police the enforcement of the law. It is the Attorney General's duty to be vigilant at all times to enforce the law with respect to contempt of court. Wherever it is drawn to the attention of the Attorney General that anything has been published that appears to be in breach of the law of contempt of court, he should proceed at once against the offender, just as he would against any other offender against the law.

PUBLICATION BEFORE CRIMINAL PROCEEDINGS ARE INSTITUTED

When an accused person has been charged with an offence, the case is before the courts and the courts can then enforce the law of contempt to safeguard the accused against the publication of news stories and comment that may tend to prejudice a fair trial. Before a charge is laid the courts have no such power. The only limitations on the widest publication of news stories and comment about an alleged crime before a charge is laid are the civil remedies provided by the

law of libel and slander. We leave out consideration of the law of criminal libel. It is a remedy that is of little value to the protection of the individual's rights. The offence of criminal libel is one of a public nature and it must be shown that the publication may tend to cause a breach of the peace. It is not sufficient that it merely may cause a private injury.

Often, when an unusual or bizarre offence has been committed, newspapers and broadcasting media publish many lurid details of the crime, together with interviews with persons who may ultimately be witnesses if a charge is laid. Publication of news of this sort may have the cumulative effect of convincing members of the public that a particular individual is guilty of the crime. In one case that was drawn to the attention of this Commission, the Canadian Broadcasting Corporation broadcast the views of members of the public interviewed on the streets. Opinions were expressed that a certain individual was guilty of murder, notwithstanding that the law enforcement agencies did not appear to have sufficient evidence to lay a charge. This exercise in broadcasting was intended to show the effect on the public mind of the publicity given to the event in the newspapers. Whatever validity the criticisms have, the broadcast of definite statements of opinion that a particular individual is guilty of crime at any time before he has been tried and found guilty is reprehensible and something that cannot be tolerated in a self-respecting society.

It is true that there may be a right to bring an action for libel, but an action for libel is not a practical safeguard in such circumstances. Not infrequently publishers take a deliberate risk of a libel action for the sake of promoting circulation. However, it would be most dangerous to attempt to put legislative restraints on news media which would limit their power to expose wrongdoing and injustice, or to limit their exposure of failure to enforce the law. We do not think this should be done, but we recommend that police officers and others in authority should be restrained by administrative action from giving interviews for publication that may tend to interfere with the course of justice. We further recommend that steps should be taken in Ontario to establish

a council, as has been done in England, to impose a self-discipline that would restrain irresponsible, unfair and unjust publication of news and comment prior to the laying of a charge. All news media should come under the control of such council.

RECOMMENDATIONS

1. There should be no further restriction provided by law on the reporting of proceedings at preliminary inquiries.
2. Where an application is made by an accused person for a change of venue on the ground that the accused cannot get a fair trial in the locality where the charge is laid, the Attorney General ought not to oppose the application if it is based on reasonable grounds.
3. The Attorney General should act promptly to prosecute for breaches of the law respecting contempt of court, and not leave the initiation of prosecutions to the individuals affected or to the court.
4. Departmental rules should be laid down for the guidance of police officers and others in authority, restraining them from giving interviews for publication that may tend to interfere with the course of justice.
5. A self-governing council should be established in Ontario to control and discipline the press and other news media with respect to the publication of news and comment that may tend to prejudice the fair trial of an accused should a charge later be laid, unless it is shown that the publication is in the public interest.

CHAPTER 50

The Grand Jury

PRELIMINARY INQUIRY AND COMMITTAL FOR TRIAL

WHEN all the evidence has been taken by the justice presiding at a preliminary inquiry, he shall, if in his opinion the evidence is sufficient to put the accused on trial, commit the accused for trial, or, if the accused is a corporation, order it to stand trial, or, if in his opinion upon the whole evidence no sufficient case is made out to put the accused on trial, he shall discharge him.¹

There is no statutory definition of the standard to be applied in determining the sufficiency of the evidence. It has been stated that the Crown has only to show that the accused is "probably guilty".² Another test has been stated to be, whether on the evidence the court would hold that there was insufficient evidence for conviction by a jury.³ It has been said that "any doubt as to the sufficiency of the evidence should be resolved in favour of committal rather than discharge".⁴

Notwithstanding that the accused has been committed for trial in this Province, he cannot be put on his trial before a petit jury until a bill of indictment has been presented to a grand jury, and the grand jury has returned a "true bill".

¹Crim. Code, s. 460.

²*R. v. Cowden*, [1947] O.W.N. 1018, applied in *R. v. Krueger*, [1949] 1 W.W.R. 140; 93 C.C.C. 245.

³*Ex p. Reid*, [1954] O.W.N. 904.

⁴*R. v. Kaylor*, [1939] 3 W.W.R. 307.

There is no statutory standard as to the evidence required before a grand jury may return a true bill. Nor is there any method by which the decision of the grand jury may be reviewed.

REVIEW OF COMMITTAL FOR TRIAL

Pending the decision of the grand jury, the committal for trial may be challenged:

- (1) On a *certiorari* application, limited only to questions of jurisdiction. The sufficiency of the evidence to warrant a committal for trial does not relate to jurisdiction.⁵
- (2) On a *habeas corpus* application, with *certiorari* in aid, based on pre-Confederation law.⁶ On such an application which can be made only if the accused is in custody, the court has power to consider the sufficiency of the evidence, and if it is of the opinion that the evidence is not sufficient to warrant a committal for trial, the committal may be quashed and the accused may be discharged from custody.

The technicalities of these procedures make legalistic nonsense. If on being committed for trial the accused is admitted to bail, he cannot have the sufficiency of the evidence reviewed unless he surrenders himself into custody and is in custody while the application is being heard. The result is that the jurisdiction of the court to determine whether there is sufficient evidence to warrant a committal for trial depends not on the merits of the case, but on whether the accused is or is not in custody. Laskin, J. A. in the *Botting* case put forward arguments that the court could exercise some powers of review on *certiorari* while the accused was on bail, but other members of the court did not subscribe to these views and, in any case, his observations are *obiter*. However, he did not express the view that the right of review would extend to the sufficiency of the evidence to warrant committal for trial.

The Province would not have jurisdiction to change the law so as to give power to the court on a *certiorari* application

⁵*R. v. Botting*, [1966] 2 O.R. 121.

⁶An Act for more effectually securing the Liberty of the Subject, Statutes of Upper Canada 1866, 29 & 30 Victoria, c. 45.

to set aside a committal for trial on the ground of insufficiency of evidence, or any other ground relevant to the conduct of the committal. But the state of the law in this respect is relevant as to what course the Province should take with respect to the retention of grand juries. While the Province could not abolish the grand jury, the Federal government has made it a practice to do so on the request of a province.

There are those who contend that the grand jury is a relic of the past and its historic functions are no longer relevant to modern social conditions and institutions.

HISTORY OF THE GRAND JURY

The grand jury is a direct lineal descendant of the grand jury first summoned by Henry II at the Assize of Clarendon in 1166. In those unsettled times it was a creature of necessity. Composed of superior persons in the counties, it was designed and entrusted to exercise very considerable powers, both as an instrument of justice and as an instrument of local government.

When there were no police forces to investigate crime, and when there were no crown agents or prosecutors to present charges, nor any regularly constituted tribunals to hear charges, it was left to the grand jury to fulfil all these functions in the administration of criminal law.

By 1351, the trial function of the grand jury had been transferred to a second jury, known as the petit jury. Its investigative function gradually lapsed into disuse with the development of a system of public prosecution and the establishment of police forces. Today, in those Canadian provinces which still have a grand jury, only the presentment function of the grand jury remains as part of the actual machinery of the criminal process. It is in this surviving role that the grand jury is the instrument of formal indictment in respect of all trials before a judge and jury. By way of contrast, in the United States, special "blue ribbon" grand juries are still employed and play important roles in the investigation of crime, notably municipal corruption and large-scale racketeering.

Originally, the grand jury in England also enjoyed wide powers of supervision over the administration of local government. In this capacity it saw to it that various common law and statutory duties were obeyed by the inhabitants of each county, that roads, bridges, jails and other county buildings were properly maintained, and it enquired into the conduct of public officials, particularly sheriffs.

In addition, it was through the grand jury that the judges on assize executed their commissions of General Gaol Delivery. It was the duty of the grand jury to cause the local sheriff to deliver for trial all persons held in jail and to determine whether any such persons were held without just cause.

Today, the last vestige of the role of the grand jury as an instrument of local government is its right to inspect institutions in the county that are maintained in whole or in part by public money, and to report on their condition.⁷ In practice, these inspections are usually confined to jails and other custodial institutions. It is still a function of the assize grand jury to visit the jail and determine whether there are any prisoners who have been committed for trial against whom bills of indictment have not been preferred, and if so, to report the same to the presiding judge at the assize. In so doing, they perform their traditional function of delivering the gaol.

Gradually, the once broad and varied powers of the grand jury have diminished, and many have become unnecessary, as the conditions and causes which led to their creation have disappeared.

Even while its powers were diminishing, the grand jury developed a new function during the unscrupulous period of the Tudors and Stuarts. It reversed its former role as something of a crown agency and earned a reputation as a defender of the liberty of the subject against the tyrannies of the Crown and the oppressions of a servile bench.

It is its reputation as a sometime bulwark of freedom, coupled with its antiquity, which underlies most arguments put forward today in favour of the retention of the grand jury system, even though it is now merely a shadow of its lusty ancestor. The educational aspect of service on grand juries,

⁷Jurors Act, R.S.O. 1960, c. 199, s. 46.

and the infusion of a measure of wholesome democracy into the legal process, are not to be overlooked.

Notwithstanding all this, the modern trend is towards the abolition of grand juries on the ground that in practice they no longer serve any useful purpose and do not justify the inconvenience that jurors and witnesses are put to, nor the expense involved in their retention. It was on these grounds that grand juries were abolished in England in 1933, after having been suspended as a wartime measure between 1917 and 1921. In introducing the bill to abolish grand juries, Sir Thomas Inskip, Attorney General of England, said: "We all recognize that in this particular age we cannot afford to pay too high a price for sentiment. . . . The conclusion is that grand juries are not serving any really useful purpose and are at the same time very expensive."⁸

In Canada, grand juries were abolished in Manitoba in 1923, in British Columbia and Quebec in 1932, and in New Brunswick in 1959. Alberta, Saskatchewan, the Northwest Territories and the Yukon have never had a grand jury system. Thus, in Canada today, the grand jury system exists only in Ontario, Newfoundland, Nova Scotia and Prince Edward Island.

The size of the grand jury has been progressively reduced in this Province, from twenty-three members to fifteen, to thirteen, to seven. Mr. Barlow (later Mr. Justice Barlow), in his Report on the Administration of Justice, 1939, recommended that grand juries be abolished for the reasons that prompted the other provinces and England to do so, that is, inutility and needless expense.

In considering whether the grand jury system should be discontinued in Ontario, it is necessary to assess its three remaining functions:

- (1) As an instrument of indictment, i.e., to review the evidence of the crown witnesses to determine whether there is sufficient evidence to put the accused on trial before a petit jury;

⁸As quoted by Elliff, *Notes on the Abolition of the Grand Jury in England*, 29 J. Crim. Law 3, 21.

(2) As an instrument of inspection, i.e., to inspect the gaol and institutions maintained in whole or in part by public money;

(3) As an instrument of gaol delivery, i.e., to determine that all persons who have been committed for trial and are in custody are brought before the next court of competent jurisdiction.

THE GRAND JURY AS THE INSTRUMENT OF INDICTMENT

Where an accused elects or is required to be tried by a judge and jury, he cannot be so tried until a bill of indictment has first been submitted to a grand jury and a true bill has been returned. A true bill, which is the formal indictment, is a finding by a grand jury following a secret hearing at which the accused is neither present nor represented. Only crown witnesses are examined. Since there is no standard laid down to guide a grand jury in determining whether or not a true bill should be returned, they may act arbitrarily. The only review of their decisions is in the case where the grand jury fails to find a true bill. In such case, a bill of indictment for the same offence may be submitted to another grand jury. The usual instruction given to a grand jury is that they must find sufficient evidence to warrant putting the accused on trial before a petit jury. Sometimes it is put thus: "If, on all the evidence and the law as explained to you, a petit jury of reasonable men would not convict, even if no answer was given, you should find no bill."

Almost invariably the hearing before the grand jury has been preceded by a preliminary inquiry and a committal for trial by a magistrate who has found that the evidence is sufficient, if unanswered, to show that the accused is probably guilty. However, a bill of indictment may be preferred directly before the grand jury by the Attorney General, or by his direction, or with the consent of the presiding judge without a preliminary inquiry and committal for trial. This is not often done, but prosecuting counsel has frequently availed himself of the right to include in the indictment counts or

charges not disclosed in the evidence taken at the preliminary inquiry. In the great majority of cases, a magistrate has already ruled on the issue that is subsequently put before the grand jury.

But if the issue is the same in the two successive hearings, the hearings are very different. On the preliminary inquiry the proceedings are conducted by an experienced magistrate in open court in the presence of the accused, who is entitled to be represented by counsel. Crown witnesses may be cross-examined and witnesses may be called on behalf of the accused. On the other hand, the hearing before the grand jury is a closed inquiry in the absence of the accused and his counsel. Usually all witnesses for the Crown are required to re-attend before the grand jury. It may be that after only one or two witnesses have been examined, the jury may decide that the evidence is sufficient to warrant a true bill. However, before the grand jury may return no bill, they must examine all the witnesses whose names appear on the indictment. Hence the number of witnesses required to be called before the grand jury cannot be determined in advance. Crown counsel is permitted to be present at the deliberations of the grand jury to assist in the examination of witnesses, but the jury is not obliged to avail themselves of his services. Four out of seven members of the jury may reach a decision.

How far the grand jury is a necessary safeguard of personal liberty has been a matter of debate in this Province for almost a century. As early as 1869 Mr. Justice Gwynne, in addressing a grand jury at Kingston, said:

“You are aware that . . . the charges have already undergone a preliminary examination before magistrates, aided in most cases by the counsel of the Crown Attorney, so that practically the duty of grand jurors is reduced to that of inquiring whether in their opinion, . . . the depositions taken before the magistrate show sufficient *prima facie* evidence to justify putting the accused upon his trial. Now, the necessity for the continuance of this second preliminary investigation seems questionable, and it is a matter worthy of consideration whether relief might not without danger to the liberty of the subject be extended to the gentlemen who are called upon to discharge the duties of grand jurors to their own

great inconvenience, and with so little practical benefit.⁹

Such, however, is our law, that at the busiest portions of the year you are called from your avocations and private pursuits to render to the country the invaluable service of determining whether the magistrates . . . have not grossly perverted their duty. . . . I trust you will find, as indeed I doubt not you will, that the committing magistrates have not been so arbitrary and unjust as to commit the parties without some *prima facie* evidence . . . that, in fact, you will find that their labours have not been in vain.”¹⁰

Elsewhere in his charge, Gwynne, J. stated that to continue to require the intervention of grand juries was “an absurdity which can only be accounted for by that veneration for antiquity which seems to over-shadow in some things the human mind”.¹¹

There may have been a time when the quality of the magisterial bench was such that a grand jury was a necessary safeguard against vindictive and malicious prosecutions, but experience in England, and in the seven provinces in Canada which have no grand juries demonstrates that this is no longer so.

In those provinces where the grand jury system still prevails, it is possible in theory for a private prosecutor to conduct his own prosecution at the preliminary inquiry and prefer an indictment before a grand jury for any charge founded on the facts disclosed in the evidence taken at the preliminary inquiry.¹² In those provinces that do not have a grand jury system, the trial of the accused is commenced by an indictment in writing, setting forth the offence charged. The indictment may be preferred by the Attorney General or his agent, by the Deputy Attorney General, or by any person with the written consent of a judge of the court or of the Attorney General. This practice constitutes a greater shield against malicious and vexatious prosecution at the instance of a private prosecutor, but it gives to the Attorney General or his agent a right to institute a prosecution without the intervention of either a preliminary inquiry or a grand jury.

⁹Kains, *How Say You?* (1893), 11.

¹⁰*Ibid.*, 21.

¹¹*Ibid.*, 11, 12.

¹²Crim. Code, s. 486.

INSPECTION OF PUBLIC INSTITUTIONS

This function of a grand jury as set out in the Jurors Act¹³ is not an obligatory one. The jurors may inspect all or any of the institutions in the county or district that are maintained in whole or in part by public moneys. The institutions that are maintained in part by public moneys in a metropolitan area are legion.

The inspections are usually superficial and frequently controversial. In practice, the grand jury reports on reaching the relevant authorities, are merely filed. In 1936 the Attorney General asked the crown attorneys throughout the province for their views. Most of them were of the opinion that visitations by the grand jury were useless.¹⁴

The inspection of public institutions is in no sense a part of the administration of justice. If semi-annual inspections are necessary, they could be more efficiently carried out by bodies created for the purpose. Such bodies, with definite duties assigned to them, could be constituted so as to be representative of the taxpayers. No doubt responsible citizens would consider it an honour to serve on such bodies without remuneration.

The inspection of public institutions is not a function performed by a grand jury that warrants the perpetuation of the system.

GAOL DELIVERY

The court of assize is a court of general gaol delivery. The grand jury of this court performs the unique function which is not performed by a grand jury at a sittings of the General Sessions of the Peace. Its duty is to see that persons who are committed for trial and are in custody are brought to trial at the next court of competent jurisdiction. This is a function that is not duplicated by any other person or process.

The governor of the gaol is required to furnish the sheriff at the opening of every assize court with a calendar of all the persons in his custody.¹⁵ The grand jury should inspect the calendar, question inmates and hear every prisoner who

¹³R.S.O. 1960, c. 199, s. 46.

¹⁴Ferguson, J., *The Grand Jury*, 5 Cr. Law. Q. 210, 211 (1962-63).

¹⁵Jails Act, R.S.O. 1960, c. 195, s. 9.

asks to speak to them in order to determine whether anyone is being unduly held in custody. The findings of a grand jury are incorporated in a report and presented to the presiding judge. To what extent this duty is efficiently performed is problematical. Although explicitly instructed to present such a report, not infrequently grand juries have made presentations without any reference to having made the required visits. This function obviously provides an important safeguard, but the question is whether or not it is a function that could be more efficiently performed in another way.

RECOMMENDATIONS OF GRAND JURIES

Between the years 1962 and 1966, the functions of grand juries have been reviewed eight times by grand juries of the General Sessions of the Peace sitting at Toronto. The views of these grand juries have special value since they bring to bear the practical judgment of the members, based on their experience gained while serving in this branch of jury service. In one instance, as many as seventy cases were submitted to the grand jury at the one sittings.

In September, 1962, the grand jury questioned the advisability of the continuance of the grand jury system as it is presently constituted. They were particularly concerned with the effect upon witnesses appearing before them, after having been previously called to testify at a preliminary hearing, and who would be called to testify again at a trial.

A grand jury in September, 1963, stated that they concurred in previous reports that questioned the advisability of continuing the grand jury system. They recommended that the matter be investigated by some properly constituted authority.

In March, 1964, the grand jury was not able to arrive at a definite conclusion as to whether the grand jury system should be retained or abolished.

In December, 1964, a majority of the members questioned the advisability of continuing the grand jury system. They felt that it was not only costly but time-consuming, and there were many witnesses whose very jobs were at stake when they were called upon to testify on more than two occasions.

In May, 1965, the members of the grand jury were divided in their opinions as to whether or not the grand jury was useful. There was some feeling that, apart from the inspections of institutions, and the useful experience gained by jurors, the taxpayers' money had been wasted. They pointed out, however, that where "no bill" was found against an accused, the costs of a full trial were saved and the accused was not called upon to suffer the harrowing experience of a trial.

In September, 1965, the grand jury system was criticized on two grounds. The members felt that the examination of public institutions could be done much better by a special grand jury selected for this purpose alone and acting on a regular basis of approximately every six months. They also felt that their examination of the evidence to be presented by the crown counsel, and their duty to "rule" on whether or not there was sufficient evidence to proceed with a trial, were unnecessary expenses to the taxpayer, involving also the time of the crown attorney, of the various police officers and witnesses.

They concluded that "since Ontario is one of the only two provinces [*sic*] in Canada, still using the grand jury system and that it had been abolished in other parts of the British Commonwealth, that there was no valid reason for its retention".

In May, 1966, the grand jury expressed the opinion that while a tour of duty by a grand jury "is most interesting and enlightening to the seven members of the jury the cost seems out of all proportion to any value to the public". They concluded, therefore, that the grand jury system should be abolished in Ontario and requested that steps necessary to this end be taken.

CONCLUSIONS

The advantages of the grand jury system may be summarized as follows:

1. It affords an additional safeguard against requiring an accused to stand trial on evidence which is not sufficient to call upon him to present a defence,

2. It performs a useful function in inspecting institutions wholly or partially maintained by public money.
3. It perpetuates an infusion of lay participation in the administration of justice.
4. It tends to insure that the full functions of an assize court as a court of general gaol delivery are performed.

The system is open to criticism on the grounds that:

1. It enables a private prosecutor to maintain a vexatious prosecution without the consent of the Attorney General.
2. It is an unnecessary and unwarranted trespass on the time and convenience of witnesses, as well as causing them in many cases substantial economic loss.
3. It is an unwarranted trespass on the time and convenience of members of the jury, as well as causing them, in many cases, economic loss.
4. It causes delay in getting criminal cases tried.

No doubt there are cases where the accused has been committed for trial and the grand jury has found no bill, or they have refused to find a true bill for a major charge but have found a true bill for a lesser charge, e.g., where an accused has been charged with capital murder, the grand jury has in some cases refused to find a true bill for capital murder, but has found a true bill for non-capital murder or for manslaughter. That this is a real safeguard cannot be denied.

We do not think that all the processes of the grand jury in bringing witnesses before them and re-hearing evidence that has been given at a preliminary inquiry can be justified on the ground that the grand jury performs a useful function in inspecting public or semi-public institutions. This is a duty that could be performed much more efficiently and at much less expense by another body.

Nor do we think that the duty which the grand jury performs in the process of general gaol delivery is as efficiently performed as it might be. We think that the sheriff as an officer of the court should be made directly responsible to the presiding judge and charged with the duty of personally visiting the jail, checking the list of prisoners, ascertaining when they were committed for trial, and determining whether indictments

have been preferred against them. He should have the duty of hearing complaints and making a report to the presiding judge in writing. If at any time there should be a failure to perform these duties, the sheriff could be held personally responsible. At the present time the grand jury cannot be held responsible by any form of discipline for a failure to properly examine the list of prisoners who are held in the jail and to hear their complaints.

There remains to be considered the matter of whether there would be adequate safeguards of the right of the individual with respect to committal for trial on insufficient evidence. We do not know of any complaint on this point in England or in those provinces in Canada which do not have a grand jury system. However, before any action is taken to request abolition of the grand jury, the Supreme Court should be given wider powers to review on *certiorari* the sufficiency of the evidence to support a committal for trial. A statutory standard of proof should be set out, and the court should have power to quash a committal on the ground of insufficient evidence, irrespective of whether the accused is in custody or on bail.

Regardless of whether or not the grand jury is abolished in Ontario, this power of review should be given to the Supreme Court. Such a power would have a stabilizing effect on the administration of the criminal law. Magistrates would have guidance as to the nature of the evidence that warrants a committal, and the time, convenience and economic resources of witnesses would be conserved. Too many criminal cases go all the way to the conclusion of the Crown's case, only to be terminated by the decision of the trial judge that there is not sufficient evidence to go to the jury. In such cases witnesses have been required to attend court at least three times, the accused has been required to have his witnesses in attendance at the trial, and has been put not only to the expense of a trial, but to the distressing experience of one as well.

We have concluded that if the powers of review of committals for trial were extended as we have suggested, the arguments in favour of the discontinuance of the grand jury system in Ontario would outweigh the arguments in favour of its continuance.

CHAPTER 51

Appeals from Convictions for Offences Against the Provincial Law

By the adoption of Part XXIV of the Criminal Code¹ two methods of appeal are provided where an accused has been convicted of an offence against the provincial law:

- (1) An appeal by way of stated case to a judge of the Supreme Court on a question of law or jurisdiction;²
- (2) An appeal to a county or district court on any question of law or fact.³

APPEALS BY WAY OF STATED CASE

A party to the proceedings, or the Attorney General of the Province, may exercise the rights of appeal given. It is unnecessary to go into the details of the procedure. For our purpose it is sufficient to say that before a case is stated, the convicted person is required to enter into a recognizance or make a cash deposit conditioned

- (a) to prosecute his appeal without delay;
- (b) to submit to the judgment of the Supreme Court; and
- (c) to pay any costs that are awarded against him.

¹Summary Convictions Act, R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1.

²Crim. Code, s. 734, *et seq.*

³*Ibid.*, s. 720, as amended by Can. 1959, c. 41, s. 34.

These provisions do not apply to an appeal by the Attorney General.⁴

Before the stated case is delivered, a convicted person must pay to the summary conviction court or the justice of the peace the fees to which they are entitled. If the appellant is in custody, he may be released on a further recognizance conditioned to appear within ten days after judgment is given, and to abide by the judgment, unless the conviction is set aside.⁵

The procedure by way of a stated case is a simple and expeditious one by which questions of law and jurisdiction may be settled.

There does not seem to be any sound reason why a person convicted for a provincial offence should be required to give security for the penalty imposed on him, and security for costs, when he applies to have the conviction set aside, before he can exercise the rights of appeal given to him by law. This is discriminatory legislation which gives to the man of means access to the Supreme Court, but denies it to the man without means. In a civil case where mere property rights are involved, a party to the proceedings has wide rights of appeal without giving security; but in the case of a summary conviction where the liberty of the subject is involved, the appellant is required to give security. Where an accused has been convicted on indictment, he may appeal, no matter what the offence, without giving any security for any penalty imposed, or for the costs of the appeal.

The provision that an appellant must pay to the summary conviction court or the justices the fees to which they are entitled, before the stated case is delivered to him, is wrong in principle. If the recommendations contained in this Report concerning fees and costs in criminal cases are accepted, this provision will cease to be effective. If such recommendations are not accepted, the provisions requiring payment of the costs of the summary conviction court and the justices before the case is delivered, should be repealed in so far as they apply to provincial offences.

⁴*Ibid.*, s. 735.

⁵*Ibid.*

APPEALS TO THE COUNTY OR DISTRICT COURT

The defendant may appeal from his conviction, or an order made against him, or a sentence passed on him, to a county or district court. Likewise, the informant, the Attorney General or his agent, may appeal from an order dismissing an information, or against a sentence, passed upon the defendant.⁶

The proceedings on such appeals abound in technicality, and frequently appeals are dismissed by reason of some minor fault in the proceedings. The right of appeal is wholly statutory and the courts have insisted in general upon strict compliance with all preliminary steps required to be taken before the right to have the appeal heard can be exercised. It has been repeatedly held that non-compliance with statutory provisions, such as giving notice within time, entering into a recognizance, etc., deprives the court of jurisdiction to hear the appeal, and, since want of jurisdiction cannot be waived, the court must give effect to it.⁷ The application of this principle sometimes leads to absurd results. For example, where the affidavits in respect of a summary conviction appeal were sworn before the justice of the peace, it was held that he was not the proper person to swear the affidavits. The jurors of the affidavits were consequently defective and it was held that there was no jurisdiction to hear the appeal.⁸ If a recognizance is defective there is no power in the court to allow a proper one to be filed.⁹

As a condition precedent to a right of appeal, the convicted person must deposit with the summary conviction court the amount of the fine, or the sum of money to be paid and an additional amount that in the opinion of the summary conviction court is sufficient to cover the costs of the appeal.

We have dealt with the subject of bail on appeal from a summary conviction offence in Chapter 48. What we have said with respect to giving security on an application for a

⁶*Ibid.*, s. 720, as amended by Can. 1959, c. 41, s. 34.

⁷*R. v. Souter* (1959), 123 C.C.C. 393; *R. v. The Doliver Mountain Mining and Milling Co.* (1906), 10 C.C.C. 405. See *Crim. Code*, s. 722.

⁸*R. v. Casey*, [1963] 3 C.C.C. 85.

⁹*R. v. Giles*, [1930] 3 D.L.R. 273; 53 C.C.C. 248.

stated case applies with greater emphasis to appeals to the county or district court. In civil cases the rule is that the right of appeal is an open way to anyone living within the jurisdiction of the court. It is an anachronism and an injustice that one who has been fined on conviction for an indictable offence may appeal without giving security for payment of the fine, but one who has been fined a like amount must, if convicted for a provincial offence, give security for payment of the fine before he may proceed with his appeal. In some cases a monetary penalty or conviction for a provincial offence may be as high as \$25,000.

We recommend that new rules of procedure for appeals from conviction for provincial offences should be drawn. They should provide a simple procedure similar to that applicable to indictable offences. Giving and filing notice of appeal, setting out the grounds of the appeal, should be sufficient and no security should be required. The appeal court should have power in its discretion to enlarge the time for appealing, as in the case of indictable offences, and it should have power in its discretion to permit the amendment of the proceedings where there has been some technical error, as long as there would be no substantial prejudice to the parties involved. But the appeal court should not have the power to amend the charge so as to substitute another offence for the offence charged.

Costs

In Chapter 39 we discussed the subject of costs in magistrates' and justices' courts and recommended that summary offences should be treated in the same way as indictable offences, with respect to costs, and that all provisions as to costs in reference to prosecutions arising under provincial statutes should be repealed. Although we were discussing the subject in relation to proceedings in the magistrates' courts, what we said there has equal application to proceedings by way of appeal. It is difficult to see on what rational basis a person convicted of a summary offence should be required to pay the costs of an unsuccessful appeal, while a person convicted of an indictable offence may appeal without any obligation to pay costs. The provisions incorporated in the Summary

Convictions Act are relics of archaic times. The right of the individual is a matter of secondary consideration in this branch of the criminal law.

There is no scale laid down for the costs which an unsuccessful appellant may be required to pay. The appeal court may make any order as to costs which it considers just and reasonable,¹⁰ and there is no right to appeal or right to review an order as to costs.

If the costs are not paid within the period fixed for payment, the defaulter may be committed to jail for a period not exceeding one month, unless the amount of the costs and, where the justice thinks fit to order, the costs of committal and conveyance of the defaulter to prison, are sooner paid.¹¹ The result is that an impecunious person who has been convicted must not only give security for the costs of the proceedings before the magistrate, security for the amount that he is ordered to pay, and security for what in the opinion of the summary conviction court is sufficient to cover the costs of the appeal, but he also must risk having to pay further costs in the amount fixed by the appeal court.¹²

This is indefensible discriminatory legislation. The person of means who can provide the required security may exercise his right of appeal, while the man without means may not if he cannot provide the security. It is no answer to say that, were it not for these restrictive provisions, the courts might be cluttered up with appeals. To state that argument is to defeat it. It is based on the theory that the sanction of costs is imposed to restrict appeals which would otherwise be taken, if the persons involved had the necessary funds.

Nature of Appeal

As has been stated elsewhere, except in the case of appeals from convictions for offences under the Liquor Control Act and the Liquor Licence Act, the appeal is by way of trial

¹⁰Crim. Code, s. 730.

¹¹*Ibid.*, s. 731(4).

¹²Under the Liquor Control Act, R.S.O. 1960, c. 217, s. 140 (4), and the Liquor Licence Act, R.S.O. 1960, c. 218, which adopts the provision of the Liquor Control Act, the sum of \$50 is fixed as the amount of security for costs which must be given, but this does not fix the amount of costs which may be assessed.

de novo. The procedure by way of trial *de novo* is a relic of frontier days in Canada when the administration of criminal justice was largely in the hands of lay magistrates and justices. Until comparatively recent years the only notes of the evidence given at a trial were those endorsed on the back of the information in the handwriting of the magistrate or justice of the peace. In the early twenties shorthand reporters were introduced into the summary conviction courts for the first time. Since then it has been a general practice to have the evidence taken down by an authorized recording process. This may not be done in all cases, but it is done in most cases. This fact has been recognized in the Liquor Control Act,¹³ and the Liquor Licence Act¹⁴ adopting the provisions of the Liquor Control Act, which provide that all appeals are on the record.

We think that too often the trial before the magistrate is merely a preliminary exercise and that the real evidence is often reserved for the trial before the county court judge. The following passage, taken from the record of this Commission, supports this view. A crown attorney, whose name it is unnecessary to mention, with great frankness engaged in this discussion:

“THE COMMISSIONER: Some make mention that a trial *de novo* should disappear altogether. It means bringing back witnesses who have already given their evidence and so on.

MR. : I submit that so long as the magistrates’ courts are so overcrowded and so long as the volume of work is so heavy that there is a need for a more leisurely trial *de novo*—

THE COMMISSIONER: I would have thought that you were looking for the cure for a disease after the patient has died or has been afflicted. It is a cure at the other end, because every person cannot afford a trial *de novo*. Shouldn’t the first trial be just as good as the trial *de novo*?

MR. : In the magistrates’ courts the dockets are long and there is a great deal of work to do in the day.

THE COMMISSIONER: But I am thinking of the accused man. Does he have to go to a trial *de novo* in order to get a proper trial? Isn’t it better to have a proper trial in the first instance?

¹³R.S.O. 1960, c. 217, s. 140(12).

¹⁴R.S.O. 1960, c. 218, s. 66 (1).

MR. : As an ideal I agree with you, my lord, but often-times when cases come on in magistrates' court neither the prosecution nor the defence know much about them until minutes before the evidence is called.

THE COMMISSIONER: I can have some sympathy with the defence but I haven't much sympathy with the Crown that they should have a chance to make a better record the next time because they have not had a chance the first time.

MR. : I find that when there is a heavy docket that it is best not to labour the case with the magistrate by putting into the case the care which is normal in the higher courts. If I tried to I would perhaps not achieve the desired result."

This passage speaks eloquently for a new approach to the whole subject of the magistrates' courts. It likewise makes it clear that the weight of the power of the Crown is against the accused when the trial *de novo* can be used as a means of having an exploratory trial before the magistrate, with the real trial taking place before the county court.

The convenience of witnesses requires some consideration. Where the trial *de novo* is held, they are all required to return a second time, unless both parties agree to abide by the transcript of the evidence taken before the magistrate. Considering the rate of witness' fees paid, a matter which we shall discuss later in this Report, attendance a second time to give evidence in the same case is an unwarranted trespass on the time and financial resources of witnesses.

Two alternatives require consideration:

- (1) A hearing on the record, as in the case of appeals from conviction for offences under the Liquor Control Act and the Liquor Licence Act; or
- (2) A hearing on the record with power in the appeal court to hear further and other evidence where it considers it to be in the interest of justice in the case.

Where no proper record has been kept, it would be essential that the parties should have free rights to call all relevant evidence. We think the procedure set out in the second alternative is the better course. We think that there is no sound reason why the same essential rules governing appeals from a conviction on indictment should not apply to appeals

from a conviction for a provincial offence. Having said this, we wish to make it clear that the right to call further evidence on the appeal should not be restricted to those cases where it must be demonstrated to the satisfaction of the court that such evidence was unknown and not available at the trial.

APPEALS BY THE CROWN

In England, unlike Canada, there is no appeal by the Crown from an acquittal on indictment, nor is there a right to appeal from a magistrates' court to a quarter sessions from the dismissal of an information or complaint, unless the right is expressly conferred in the statute creating the offence.¹⁵ Lord Coleridge, C. J., stated the principle in *R. v. The Keepers of the Peace and Justices of the County of London*:

"A person is prosecuted for some breach of the law, which is to be proved in a particular way. The general principle of law is that, if acquitted, he is not to be a second time vexed . . . our decision must be governed by broad and well-recognised principles of construction. One of those is, that a man acquitted is not to be again proceeded against with respect to the same matter; another principle is that an appeal is never given except by statute."¹⁶

In *R. v. Keepers of the Peace, and Justices of the County of London*, Humphreys, J. stated:

" . . . a right of appeal against the dismissal of a criminal charge is so unusual that it may be said to be a general rule that there is no such right . . ."¹⁷

We think that the principles expressed in these judgments should apply generally to provincial offences. It is a vexatious harassment of an individual that the Crown should have a right to place the whole weight of the State against an accused person a second time, after he has been acquitted by a competent court exercising its legal jurisdiction. The enforcement of provincial law is for the purpose of regulation and it does not affect the body politic, as does the enforcement of the criminal law. A person who has stood trial and been

¹⁵25 Halsbury, *Laws of England* (3rd ed.), 291.

¹⁶(1890), 25 Q.B.D. 357, 360.

¹⁷[1945] 2 All E.R. 298, 300.

acquitted of a provincial offence ought not to be called upon to produce his witnesses and to stand trial a second time. We recommend that the right of the Crown or of an informant to appeal to the county or district court be abolished.

There are, however, certain cases where important questions of law arise in the prosecution of provincial offences and it is important that the magistrates and justices should exercise their jurisdiction according to law. These cases could all be dealt with on an application for a stated case. We do not recommend that the right of the Crown or of an informant to appeal by way of a stated case on questions of law or jurisdiction be entirely taken away. We do, however, recommend that the provisions of section 19(3) of the Summary Convictions Act be extended to all appeals by the Crown, so that in no case should an accused be required to pay the costs incurred by the Crown or the informant on an appeal. Such an extension, however, would be unnecessary if our recommendation that all costs be abolished is accepted.

APPEALS TO THE COURT OF APPEAL

An appeal lies to the Court of Appeal with leave of the Court both from a decision of a Supreme Court judge on a stated case, and a county or district court judge on a trial *de novo*. The right of appeal is confined to any ground that involves a question of law alone. The Attorney General or prosecutor has the same right of appeal as a defendant.¹⁸

In addition to the rights of appeal set out in the preceding paragraph, an appeal may be taken under the Summary Convictions Act in certain cases, by the informant or by any party to the proceedings in the court from which the appeal lies, on the certificate of the Attorney General of Canada or of Ontario, that the judgment involves a question of construction of The British North America Act, and is of sufficient importance to justify an appeal.¹⁹

We think the right of the prosecutor and the Attorney General to appeal to the Court of Appeal should be confined to those constitutional cases contemplated by section 19 of

¹⁸Crim. Code, s. 743, as amended by Can. 1959, c. 41, s. 34.

¹⁹Summary Convictions Act, R.S.O. 1960, c. 387, s. 19(1).

the Summary Convictions Act and a stated case on the construction of any statute.

We have recommended that there be no general right of appeal by the prosecutor or the Attorney General to a judge of the county or district court from an acquittal by a magistrate. It would be inconsistent to give a general right to appeal to the Court of Appeal from an order quashing a conviction made by a Supreme Court judge, or an acquittal by a county or district court judge.

COSTS ON APPEAL TO THE COURT OF APPEAL

Where the Attorney General exercises a right of appeal, an accused person ought not to be required to pay his own costs. Instead of the right being one that may be exercised on the opinion of the Attorney General, it should be exercised with leave of the Court of Appeal and on such terms as to costs as the court in its discretion might fix, but in no case should the accused have to pay the costs of the Attorney General.

Whether the appeal to the Court of Appeal is an appeal from a Supreme Court judge on a stated case or from a county court judge on a trial *de novo*, the Court of Appeal may make any order as to costs that it considers proper in relation to the appeal.²⁰ In cases where the appeal is taken on the certificate of the Attorney General under section 19 of the Summary Convictions Act, which is limited to constitutional questions, the court may not award costs against a defendant.

The result is this. If the defendant is successful before the county court judge or the Supreme Court judge on a stated case, the Attorney General may, with leave of the Court of Appeal, appeal the conviction on a constitutional point of law and be awarded costs, but if the Attorney General proceeds on his own certificate he cannot collect costs if successful. In each case he has been successful, yet if the Attorney General has gone by one route, the defendant may have to pay costs; but if he has gone another route, the defendant will not have to pay costs. These provisions are absurdly inconsistent.

²⁰Crim. Code, s. 743, as amended by Can. 1960-61, c. 43, s. 45.

RECOMMENDATIONS

The Summary Convictions Act should be amended:

1. To permit a person convicted of a provincial offence to appeal by way of stated case, without giving security for the penalty imposed, or for the fees and costs incurred, or which may be incurred in the appeal.
2. To abolish the obligation of an unsuccessful appellant to pay costs to the Crown on an appeal by way of stated case.
3. On appeal to the county or district court:
 - (a) To permit a person convicted of a provincial offence to appeal to the county or district court without giving security for the penalty imposed, the costs incurred or the costs of the appeal;
 - (b) To provide simple rules of procedure for an appeal from a conviction for a provincial offence, which should be procedural only and should not go to the jurisdiction of the appeal court;
 - (c) To give the appeal court jurisdiction to extend the time for appealing;
 - (d) To give the appeal court a discretion to allow an amendment of the proceedings, as long as there would be no substantial prejudice to the parties involved. (The appeal court should not have power to amend the charge so as to substitute another offence for the offence charged.);
 - (e) To abolish the liability of an unsuccessful appellant to pay the costs of the Crown on an appeal;
 - (f) To provide that the appeal should be on the record, with power in the court to hear further and other evidence where it considers that it is in the interest of justice in the case to do so. The right to call further evidence on the appeal should not be restricted to those cases where it must be demonstrated to the satisfaction of the court that the evidence sought to be produced was unknown and not available at the trial.
4. To provide that the right of appeal by the Crown by way of stated case, or to the county or district court from an

acquittal for a provincial offence, should be abolished except in cases involving the construction of the B.N.A. Act or any other statute.

5. To provide that the Attorney General should have the right to appeal directly to the Court of Appeal, upon obtaining the leave of that court, on a question of law involving the construction of the B.N.A. Act or any other statute where the accused has been acquitted of a provincial offence by a magistrate, justice of the peace, a county or district court judge, or by the order of a Supreme Court judge upon a stated case.
6. To provide that on appeals under the preceding paragraph, the accused should not be required to pay the costs of the appeal in any case, and that in granting leave the Court of Appeal should have the power to impose terms upon the Attorney General to pay the costs of the respondent.

CHAPTER 52

Court Reporting

FUNCTIONS OF THE COURT REPORTERS

A PRACTICE has developed in Ontario to record in some manner a verbatim account of the proceedings in all trials conducted in the Supreme Court, the county and district courts, the division courts (where the amount in dispute is \$200 or more) and in most proceedings in the magistrates' courts. Similarly, verbatim accounts are made of the proceedings of the Legislature, the Parliament of Canada, Royal Commissions, inquests and hearings before such provincial and federal tribunals as the Ontario Municipal Board, the Ontario Energy Board, the Ontario Securities Commission, the National Energy Board, the Canada Pensions Commission, the Tax Appeal Board and other similar boards and tribunals. All examinations for discovery provided for under the Rules of Practice and Procedure governing the Supreme Court and the county court are recorded verbatim, as are proceedings in the juvenile and family courts, and some proceedings before the Registrar in Bankruptcy and the Masters of the Supreme Court. It is apparent that those serving as reporters for these tribunals and bodies should be well qualified and that an adequate supply of reporters (and particularly of court reporters) should be maintained throughout the province.

We are particularly concerned with court reporters and those reporting proceedings of tribunals whose decisions are

subject to review in the courts. It is self-evident that where a record is kept, it must be accurate, for rights on appeal or review will in many cases depend on the record.

Court reporting is not to be confused with secretarial or stenographic assistance. In a brief submitted to this Commission by the Chartered Shorthand Reporters' Association of Ontario, the basic qualifications of a court reporter were well stated:

"... To report accurately and sensibly a grasp of many other things is necessary: e.g., general knowledge of current and historical events (acquired by reading newspapers, books and trade journals), a good knowledge of the English language and familiarity with classical quotations, knowledge of legal forms, maxims and procedures, engineering, chemical, architectural and medical phraseology, and the ability to concentrate the mind upon what is being said as well as knowing how to record it. In order to produce useful and accurate transcripts the reporter should understand what he is writing. The acquisition of such a wide knowledge is a continuing process, but a basic knowledge can be gained from lectures, dictated material, listening to court cases and reading transcripts.

In England the training period is considered to be a minimum of two years; and it has been found from experience that a similar length of time is required in Canada where shorthand and stenotypy are the means adopted.

A survey of reporters practising in County and District Courts reveals that in the majority of cases the necessary experience has had to be acquired in court, after a commercial course in high school or business college. It can be readily understood that this must be unsatisfactory in the early stages, and the same comments apply *a fortiori* to Magistrates Courts."

There does not appear to be any clear statutory provision that the evidence in civil cases must be reported. From the provisions of certain statutes and the Rules of Practice and Procedure of the Supreme Court of Ontario, it may be implied that all evidence in civil cases, except those tried in the division court where the amount claimed is under \$200, must be taken down by a court reporter; but this has not been spe-

cifically set out, except in the Division Courts Act.¹ Likewise, although there is no mandatory requirement that the evidence be taken down in the juvenile and family courts, or at coroners' inquests, statutory provision is made for the appointment of reporters.²

There are specific requirements in the Criminal Code that a verbatim record of the proceedings at trials of indictable and summary offences be made.³ An appellant who has been convicted on indictment must file a certificate that a transcript of evidence has been ordered.⁴

In England the Rules of Court provide that in every action or other proceeding in the Queen's Bench Division or in the Chancery Division, tried or heard with witnesses, including any matter heard by an assize court, an "official shorthand note" shall be taken of any evidence given orally in court and of any summing up by the judge and judgment given by him, unless the judge otherwise directs. The practice in England in the county courts is not to take an official shorthand note, but to rely upon notes made by the judge at trial for the purpose of appeal. In appeals from decisions of the Queen's Bench Division or Chancery Division, if the judge intimates that his note will be sufficient, the shorthand note of the evidence need not be transcribed. Any reference to "a shorthand note of any proceedings" includes "a record of the proceedings made by mechanical means".⁵

It has been a long-established practice in Ontario that a record of proceedings in all civil courts, except where the amount claimed in the division court is under \$200, be taken down in shorthand and that a copy of the transcript is required on appeal. In recent years this has likewise been the practice in most courts, whether required by statute or not. In *Patton v. The Yukon Consolidated Gold Corporation Ltd.*⁶

¹R.S.O. 1960, c. 110, s. 92, as amended by Ont. 1964, c. 25, s. 1.

²Juvenile and Family Courts Act, R.S.O. 1960, c. 201, s. 12; Coroners Act, R.S.O. 1960, c. 69, s. 32, as amended by Ont. 1960-61, c. 12, s. 11.

³Crim. Code, s. 453, as amended by Can. 1960, c. 37, s. 2 (1); ss. 467, 468, 471; s. 555, as amended by Can. 1960, c. 37, s. 3; and s. 708.

⁴*Ibid.*, s. 588.

⁵R.S.C. Ord. 66A.

⁶[1933] O.R. 192.

the Ontario Court of Appeal was required to deal with the problem where a transcript of the evidence could not be made from the notes taken by a reporter who had died. Riddell, J. A. said:

"In view of the fact that the Official Reporter is now a part, and an important part, of the trial tribunal, I think that the impossibility of obtaining his record of the proceedings is an accident which entitles a party who is not satisfied with the disposition at the trial of his case and desires to appeal, to have a new trial."⁷

In the light of the demand for reporters and the importance of good reporting to the individual involved in the processes of courts and tribunals, it is necessary for us to examine how the demand is met in Ontario and what effective safeguards are provided for the rights of the individual to have an accurate record of the proceedings made and to have it accurately and promptly transcribed when required.

THE TRAINING OF COURT REPORTERS

No sufficient course of training is given in high schools, technical institutes or colleges. An effort is made by the Supreme Court reporters to take on two student reporters each year, paying them a weekly salary commencing at \$66.50 and rising to \$72.50, but no similar practice is carried on in the county or district courts or in the magistrates' courts. The result has been that the local county court judges and magistrates must compete for reporters with local private industry and business offices. They have been forced to take prospective reporters who, in effect, must teach themselves the highly skilled craft of court reporting by thrusting themselves into court rooms and literally doing "the best they can" until they acquire some of the necessary skills. The injustice to accused persons and litigants is demonstrated by one county court reporter who advised the Commission that she was hired as a judge's secretary and on her first day at work she was advised that her services were required in the division court as a reporter, something that she had never before attempted.

⁷*Ibid.*, 194.

The Chartered Shorthand Reporters' Association of Ontario, formerly known as the Chartered Stenographic Reporters' Association of Ontario, makes a voluntary effort to give some training to those who wish to become qualified reporters. This organization had its genesis in 1891 when the Ontario Stenographic Reporters' Act was passed.⁸ The name of the Act and the name of the Association, but not its objects, were changed in 1937.⁹ The Act does not appear in subsequent statutory revisions and it remains unconsolidated and unrepealed.

The Association has statutory powers to promote and increase the skill, knowledge and proficiency of its members and to establish standards of competence and to grant the title of "Chartered Shorthand Reporter"—"C.S.R."—to those who have three years of practical reporting experience and have passed the examinations which the Association conducts annually.

The Association conducts evening and weekend classes and lectures on a voluntary basis for the encouragement and instruction of candidates. A special court reporters' class is being conducted at a business college in Toronto. In establishing these courses of instruction, the Association is not only concerned with teaching students to take shorthand in a proficient manner, but strives to give all candidates a thorough instruction in court room procedure, English grammar, history, current events, and legal, medical and technical terminology.

Of the estimated 350 reporters engaged in reporting in various capacities throughout the Province, ninety-four are members of the Association and permitted to use the title C.S.R. Of the ninety-four members, twenty-four are reporters in the Supreme Court of Ontario, twenty-three are members of the Hansard staff in Ottawa, fourteen are employed in special examiners' offices, eleven are county and district court reporters, four are juvenile and family court reporters, and eighteen are freelance reporters. The Association has no members employed permanently in the magistrates' courts.

⁸Ont. 1891, c. 30.

⁹Chartered Shorthand Reporters' Act, R.S.O. 1937, c. 234.

SUPERVISION OF COURT REPORTERS

There is no procedure by means of which court reporters other than the Supreme Court reporters can be supervised or disciplined. The county and district court judges may exercise some benevolent supervision, but this is no answer to complaints that are not infrequently made to the Inspector of Legal Offices, relating to undue delay in producing transcripts for appeals, and in some cases, to the unintelligible nature of the transcripts. The county or district court judge has nothing to do with the duties performed outside his court and he has no real power of supervision over those that are performed in his court. When there is delay in producing transcripts, the person affected is deprived of his right to have a prompt hearing of his appeal, which may involve his serving an unjust prison term. Delay in getting out transcripts may be due to several causes. The reporter may be overburdened with work in the courts, he may be inefficient, he may have too many conflicting duties, and in some cases he becomes engaged in other reporting which conflicts with his work as a court reporter in order to earn higher rates for transcripts than those allowed by the tariff fixed for court reporters.

SUPREME COURT REPORTERS

Supreme Court reporters must be considered separately from all other reporters. They are appointed by the Lieutenant Governor in Council and paid by the provincial government. They are officers of the Supreme Court. A high quality of excellence is demanded of them. They must be members of the Chartered Shorthand Reporters' Association of Ontario.

At present there are twenty-four Supreme Court reporters, each of whom is assigned to a judge of the High Court of Justice for Ontario, and they travel with the judge on circuit. The annual salary of a Supreme Court reporter is \$8,800 for the first year, with increments over the succeeding four years to a maximum of \$10,500. In addition to their salaries, they are permitted to retain for their own use all income received from the preparation of transcripts. The rate is fixed at \$1.25 per page for mechanical reproduction. Out of this they are required to pay for some clerical assistance and overhead ex-

penses.¹⁰ In recent years it has been difficult to obtain a sufficient number of proficient shorthand writers to meet the requirements of the Supreme Court. The demand has largely been met by bringing reporters to Canada from overseas. This source of supply is tenuous and cannot be relied on for the future.

DISTRICT COURT REPORTERS

There are approximately seventy reporters in the county and district courts. They are appointed by the Lieutenant Governor in Council.¹¹ Reporters in the district courts are qualified by the Province. Usually the applicant is required to pass a proficiency test conducted by a Supreme Court reporter. The general requirement is that the applicant be able to take down 160 words per minute. In keeping with the provincial responsibility for assuming the cost of the administration of justice in provisional judicial districts,¹² district court reporters are remunerated by the Province and enjoy the benefits available to civil servants, such as superannuation benefits, sick leave credits, holiday entitlement, etc. They are classified into two salary groups: for class I the salary range is from \$4,200 to \$5,000 per annum, and for class II it is from \$5,000 to \$6,000 per annum. In addition to his salary the reporter is entitled to retain for his own use all sums received for the preparation of transcripts at the rate of \$1.25 per page for evidence required for purposes of appeal, and at the rate of \$1.25 per page for the first copy and forty cents per page for each additional copy where the evidence is not required for appeal purposes.¹³

COUNTY COURT REPORTERS

County court reporters are appointed by the Lieutenant Governor in Council. Except in York County where there is a large staff of reporters under the direction of a senior reporter, reporters are recruited, qualified and often trained by the local county court judge, who requests that an order in

¹⁰Judicature Act, R.S.O. 1960, c. 197, s. 86; O. Reg. 220/66.

¹¹County Judges Act, R.S.O. 1960, c. 77, s. 13, as amended by Ont. 1961-62, c. 25, s. 8.

¹²See Section 5 of this Part, pp. 866ff. *infra*.

¹³O. Reg. 221/66.

council be passed, appointing the person whom he has selected. Although there is no express statutory provision requiring the counties or the municipalities to pay the salaries of the county court reporters, in practice they do so. This obligation may be inferred from the County Judges Act.¹⁴ The local county court judge, in requesting the appointment of a reporter, will frequently suggest that the order in council include a provision setting out the reporter's salary, which will have been agreed to by the local municipal council. In some instances, where an increase in salary is requested by the reporter, the judge will make a representation on his behalf to the council. This is an undesirable practice which we discuss in a larger context elsewhere in this Report.¹⁵ In York County the senior reporter receives an annual salary of \$8,500, and the other reporters, who were twelve in number at the time of writing, receive annual salaries ranging from \$5,000 to \$7,500. In other counties salaries range from less than \$2,000 per year to \$7,000 per year. County court reporters are permitted to retain transcript fees in addition to their salaries. In many cases these fees are very small.

In most counties and districts, with the exception of York, Carleton, Wentworth, Middlesex and Essex, there is only one reporter, and he or she often holds several other positions in addition to that of court reporting. These reporters sometimes report examinations for discovery, inquests, juvenile and family court hearings, and act as librarians in the county law libraries, or as clerks in municipal or court offices. The court reporter almost always acts as private secretary to the county or district court judge.

Where there is a city having a population of more than 100,000 in a court district, and where it appears to the city council that "one or more stenographers are needed to do clerical work other than court reporting for the judges", the local council may hire one or more secretaries.¹⁶ In York County there are three full-time judges' secretaries, and there are two in Wentworth County. In all other counties and districts, the court reporter is also the judge's clerical secretary.

¹⁴R.S.O. 1960, c. 77, s. 13(5) (8), as amended by Ont. 1961-62, c. 25, s. 8.

¹⁵See Section 5 of this Part, pp. 866ff. *infra*.

¹⁶County Judges Act, R.S.O. 1960, c. 77, s. 22.

REPORTERS IN MAGISTRATES' COURTS

There are approximately 110 full-time and part-time magistrates' court reporters in Ontario. The Magistrates Act empowers the Lieutenant Governor in Council to make regulations providing for the appointment and employment of stenographic reporters to take down evidence in the magistrates' courts, fixing their salaries, fees, expenses and other forms of remuneration, and providing for their remuneration by the municipal corporation or by the parties to any proceeding before the magistrate as part of the costs in the case, or partly by one method and partly by the other.¹⁷

Generally speaking, the magistrate, like the county court judge, locates and trains his own court reporter, who is appointed, on his advice, by order in council. The regulations passed pursuant to the Magistrates Act prior to September 1, 1966, provided that the Lieutenant Governor in Council had the power to appoint a stenographic reporter for any magistrate's court at such salary as is fixed by order in council, and that the salary be paid by the municipality which the magistrate's court serves. If it served more than one municipality or parts of more than one municipality, the salary was paid on a proportionate basis by the municipalities concerned.¹⁸ This regulation was repealed as of September 1, 1966. The regulations are now silent as to how and by whom reporters in the magistrates' courts are to be appointed and who is to pay their salaries. Section 15 is an attempt to cover the matter but it does so in a very confused manner.¹⁹ It reads:

"15. (1) The stenographic reporter's fees and remuneration shall, where lawful, *be included in the costs* that the magistrate orders to be paid by the parties to the proceeding.

(2) Where the fees and remuneration of a stenographic reporter not on salary are not paid under subsection 1, they shall be paid,

(a) where the offence was committed in a county, by the county but, if the fine, if any, is payable to another municipality, then they shall be paid by the other municipality;

¹⁷Magistrates Act, R.S.O. 1960, c. 226, s. 20(1)(d)(e).

¹⁸R.R.O. 1960, Reg. 415, s. 9.

¹⁹O. Reg. 219/66, s. 15.

- (b) where the offence was committed in a municipality in a provisional judicial district, by the municipality; and
- (c) where the offence was committed in unorganized territory, by the Province.” (Italics added.)

It may be that the procedure with regard to the payment of salaries prior to September 1, 1966, is now and will continue to be followed.

Prior to September 1, 1966, the salaries of the magistrates court reporters in Toronto, Hamilton, London, Windsor and Ottawa were paid by the municipalities, and the reporters were treated as municipal employees. In all other counties, the reporters are paid a salary as approved by the Inspector of Legal Offices, out of the fines and fees collected by the magistrate's court. If the fines and fees prove inadequate for this purpose, the Province, which also pays the salaries of the magistrates' court reporters in the districts, makes up the deficiency. The reporters in the districts enjoy all the benefits of the provincial civil service. They receive annual salaries pursuant to the following categories: Junior stenographic reporters—\$3,000 to \$3,600; reporters, class I—\$3,900 to \$4,800; reporters, class II—\$5,000 to \$5,750. Annual increments are available to magistrates' court reporters, provided the magistrate does not indicate dissatisfaction with the quality of their work. As in the case of Supreme Court reporters and the county and district court reporters, the magistrates' court reporters are entitled to retain fees for transcripts upon the same scale as the other courts.

Where a magistrate does not have the services of a stenographic reporter on salary, he may, upon the written request of a party to a proceeding before him, engage the services of a stenographic reporter to take the evidence, and a stenographic reporter thus engaged is entitled to a fee of \$5 per hour for the time he is actually engaged in court, not to exceed \$25 per day, together with travelling expenses. These fees, where lawful, shall be included in the costs which the magistrate orders to be paid by the parties to the proceedings, but where they are not so paid, they are to be paid by the local municipality in which the offence was committed, or by

the Province if the offence was committed in an unorganized territory.²⁰

As in the case of county and district court reporters, there is no provision for supervising or disciplining the reporters in the magistrates courts, nor is there provision for reviewing the quality of the work done by each reporter. There is no established procedure by which a reporter may be suspended or dismissed. As in the case of county court reporters, the most frequent complaints received by the Inspector of Legal Offices relate to the delay in the preparation of transcripts for appeal purposes, and the inferior quality of some transcripts.

JUVENILE AND FAMILY COURT REPORTERS

The Attorney General is empowered to appoint one or more court reporters for the juvenile and family courts and fix their salaries.²¹ Section 16 of the Juvenile and Family Courts Act²² requires the municipality in and for which the court is established to pay the salaries of the reporters. With the exception of large centres, such as Metropolitan Toronto where the court sits daily and reporters are appointed to the court on a full-time basis, the local magistrate or the local county court or district court judge, who is also the juvenile and family court judge, uses his own court reporter to do the work in most instances. In each case the reporter may receive a bonus for this additional responsibility. In other instances, the juvenile and family court reporters are hired on a part-time basis and remunerated accordingly.

In Metropolitan Toronto, the salaries range from \$4,000 to \$5,500 per annum. Here, again, no provisions exist to regulate the qualifications of the reporters, nor are there any procedures to suspend, discipline or dismiss a reporter for cause.

DIVISION COURT REPORTERS

In those cases where it is required that evidence be taken down, the provisions of section 13 of the County Judges Act

²⁰*Ibid.*, s. 15.

²¹Juvenile and Family Courts Act, R.S.O. 1960, c. 201, s. 12.

²²*Ibid.*, s. 16, as amended by Ont. 1964, c. 51, s. 6 (1).

apply.²³ Thus, county or district court reporters may be required to take down evidence in the division courts for which they receive no additional remuneration. They may, of course, retain all fees obtained from the preparation of transcripts. These amount to very little.

CORONERS INQUEST REPORTERS

The Coroners Act provides that the evidence given at an inquest "may be recorded by a person approved by the Crown attorney and appointed by the coroner".²⁴ The reporter's fees for attending at any one inquest are \$20 per day or \$5 per hour, whichever is the greater amount.²⁵ The fees of the reporter are paid by the county, city or separated town in which the inquest is held, or by the treasurer of the provisional judicial district if the inquest is held in a district outside a city.²⁶ In addition to the prescribed fees, the reporter is entitled to charge a fee for the preparation of a transcript, equal to that prescribed for court reporters under the County Judges Act, i.e., \$1.25 per page. Generally, it is the county or district court reporter or the magistrate's court reporter who attends at inquests; however, the coroner is entitled to retain the services of any freelance reporter.

In Metropolitan Toronto, for example, the York County court reporters no longer report inquests. A reporter has been employed by the coroner's office on a full-time basis for the past three years. This reporter is not paid a salary but is paid pursuant to Schedule "E" of the Coroners Act. He is entitled to and does in fact retain all fees received by him for the preparation of the transcripts which may be ordered from time to time. This reporter is not employed by the coroner's office in any other capacity. The Commission has been advised that all of his time is taken up in attending inquests and in preparing transcripts. He uses a tape recorder to record the evidence presented at the inquests and does not use shorthand.

²³Division Courts Act, R.S.O. 1960, c. 110, s. 92, as amended by Ont. 1964, c. 25, s. 1.

²⁴R.S.O. 1960, c. 69, s. 32, as amended by Ont. 1960-61, c. 12, s. 11.

²⁵*Ibid.*, s. 37 (6), as amended by Ont. 1966, c. 27, s. 9, and Schedule "E" to the Act.

²⁶*Ibid.*, s. 38 (3).

We emphasize the importance of accurate reporting at a coroner's inquest. Witnesses may be cross-examined on their testimony given there. Errors in reporting may discredit truthful witnesses and bring about a miscarriage of justice.

REPORTERS FOR TRIBUNALS

The proceedings before statutory tribunals and Royal Commissions are usually reported by the regular court reporters, or reporters employed by organizations doing freelance reporting. These organizations have reporters available to attend at meetings of statutory boards, tribunals and Royal Commissions. The organization supplying the reporters is paid from government funds on an agreed basis. Frequently, as in the case of Royal Commissions, tenders are called for and usually the lowest bidder obtains the contract to attend and report the proceedings of the Commission. Transcripts of the proceedings are available at a rate fixed by the reporters. When the Supreme Court reporters are the successful bidders, which is usual only in the case of Royal Commissions, it is the reporters in actual attendance and taking down evidence before the Commission who share on a proportionate basis any fees obtained for the preparation of transcripts. Generally speaking, transcripts of evidence taken at Royal Commissions are provided on a daily basis.

REPORTERS FOR SPECIAL EXAMINERS

In the City of Toronto there are six special examiners, each of whom has on his staff a number of reporters who take down the evidence given at examinations for discovery, cross-examinations on affidavits and other proceedings. (Special examiners have also been appointed in Ottawa and Hamilton.) These reporters are remunerated on a commission basis by those by whom they are employed. In the county towns every local registrar of the Supreme Court of Ontario and clerk of the county court is *ex officio* a special examiner for the county for which he is appointed.²⁷ Frequently he will employ the services of the local county court reporter to report the examinations for discovery and other examinations. Those

²⁷Judicature Act, R.S.O. 1960, c. 197, s. 100.

requiring the services of a special examiner are required to pay the fees set out in Tariff B to the Rules of Practice and Procedure²⁸ which establishes a basic fee for the appointment, for the oath, and an hourly fee for taking down the depositions. If a transcript of the evidence is required, an additional fee of a maximum \$1.25 per page is charged for the first copy and a maximum of fifty cents per page for each additional copy. All of the fees, including the fee for the transcript, are paid to the special examiner, and not to the reporter. In the City of Toronto the reporter is then paid by the special examiner, by way of commission, an agreed percentage of the gross fees collected by the special examiner.

Where a transcript of the examination is required by the court²⁹ there is no provision requiring anyone to pay the special examiner a fee for the preparation of the transcript for the use of the court. It is accordingly supplied without charge. This fact, plus the practice in Toronto of remunerating reporters in special examiners' offices on a commission basis, is said to make it quite difficult to obtain qualified reporters who will work for special examiners in Toronto.

There is also some apparent dissatisfaction in certain county towns where, for example, the local registrar is special examiner in name only, but all the work in making the appointment, providing the equipment, taking down the evidence, and preparing the transcript is done by the reporter. He gets only a percentage of the fees, the balance going to the local registrar who, in effect, only lends his name to the office of special examiner. For judicial purposes there are forty-eight counties and districts in the Province. With the exception of those centres where there are special examiners, practices followed in remunerating the reporters vary widely. For example, in some counties the local registrar *qua* special examiner will not use the local county court reporter or magistrate's court reporter, but will hire another person to report the examinations, and pay him on a salary or some other basis.

²⁸O. Reg. 207/66.

²⁹Upon the trial of a civil action where the examination for discovery has been held, or upon the return of a motion where witnesses have been cross-examined on affidavits, or where witnesses have been examined on a pending motion, the special examiner is required to file a transcript of the examination with the court.

In those counties and districts where the county and district court reporter is used to assist the local registrar *qua* special examiner, in some instances the reporter is permitted to retain all of the fees recovered for the preparation of transcripts, in other instances only a percentage, and in still other instances no remuneration in addition to his regular salary is paid to the reporter. In these cases, the local registrar *qua* special examiner takes all fees for both the transcript and the appointment. This, no doubt, is the result of the absence of any specific regulations governing these matters.

SALARY SCALE

An important factor contributing to the shortage of court reporters in the Province is the fact that the salaries, particularly those set by county and municipal councils, are lower than those paid by private industry and, indeed, by the provincial authorities for good secretaries. Local councils apparently do not accept the fact that court reporters are a necessary and important part of the administration of justice. This has resulted, in some cases, in the spectacle of judges and magistrates being forced to go before local councils or committees of councils to bargain for a salary increase for reporters in their courts. To these difficulties is added the fact that some reporters are provincial employees who enjoy not only higher salaries in some cases, but, in all cases, the benefits of being civil servants, while other reporters are municipal employees who do not enjoy such benefits. This leads to the development of jealousies and disharmony among the various categories of reporters.

The provisions of the regulations to which we have alluded, providing that convicted persons must pay the costs of the reporters where employed on a part-time basis, cannot be defended on any ground. It is most unjust that an accused person who finds himself in a court where the reporter is engaged part-time is subjected to a greater penalty than when the reporter is on a full-time basis.

There may be counties where it is necessary for one qualified reporter to serve in different courts. This is to be

avoided wherever possible as it tends to disorganize the sittings of the courts to serve the convenience of the court reporter. Litigants and accused persons should not be subjected to hardship because of the lack of adequate reporting staff. Likewise, the county judges have complained that efforts to liquidate the backlog of untried cases by providing extra judicial assistance have been frustrated by the lack of court reporters.

PREMIUMS CHARGED

It has come to the attention of this Commission that in some counties special examiners and reporters in the county and district courts, and in the magistrates' courts, have been requesting and receiving a premium in excess of \$1.25 per page to give precedence in the preparation of transcripts. This happens most frequently where an appeal is taken from a criminal conviction and the appellant is in custody pending the hearing of the appeal. In such cases it is important that the transcripts be provided as expeditiously as possible. In fact, it is important that all transcripts of evidence be prepared expeditiously. Giving precedence over others by a court official demanding and receiving an additional fee for a transcript of evidence given on an examination for discovery, or at a trial, is illegal and something that should be prevented by stern disciplinary action. It gives to the wealthy a decided advantage over the poor in the administration of justice, and leads to exploitation of convicted persons. A system ought to be devised whereby the preparation of transcripts for criminal appeals should be given precedence over the preparation of transcripts for civil appeals. The work of court reporters should be so supervised and regulated that they would be able to transcribe the evidence within thirty days of the end of the trial, except in the most unusual cases.

CONCLUSIONS

The whole process of court reporting is in a very confused and disorderly state. There is no overall plan for employment, remuneration, discipline and promotion of reporters. The problems created by this condition are serious

and require a comprehensive approach to their solution. If there is to be an efficient and satisfactory system for reporting the proceedings of the courts and those tribunals whose proceedings are reported, there must be a complete reorganization of the system. It may be that greater use of mechanical means of reporting should be adopted, but that is only incidental to the problem of reorganization.

Answers to questionnaires sent out to the county court judges, magistrates and court reporters make it clear that, although the situation may be tolerable in some particular areas, nothing less than a complete reorganization will afford adequate protection for the civil rights of individuals having cases before the courts and tribunals.

We recommend in Chapter 60 that all processes of the administration of justice (except the police forces) be taken over by the Province. If this recommendation is implemented, the reorganization of the reporting system will be greatly facilitated.

RECOMMENDATIONS

1. The court reporting system should be brought completely under the control of the Attorney General.
2. There should be a Director of court reporters for the Province.
3. A planned system of educating and training court reporters should be established under the direction of the Director who should set standards of qualifications.
4. Candidates for appointment should be required to pass examinations and to meet fixed standards.
5. Where there is evidence that a court reporter is not maintaining proper standards of work, he should be required to sit for re-examination.
6. Adequate remuneration should be provided for all court reporters.
7. A hierarchy of court reporters should be established, with opportunities for advancement and promotion from one category to another.

8. One of the functions of the Director of court reporters should be to assist in the development of good court reporters by providing refresher courses and educational assistance.
9. Provision should be made that, upon adequate cause being shown, court reporters may be disciplined, or in proper cases, their services terminated.
10. A code of ethics should be prescribed so that reporters may know what standards are required of them.
11. Provisions should be made for the relief of court reporters who, by reason of the pressure of court sittings, may be unreasonably delayed in getting out transcripts that have been ordered.
12. Transcripts for criminal proceedings should have precedence.
13. The giving and receipt of premiums or inducements to give precedence in the preparation of transcripts should be expressly prohibited.
14. A special statute should be passed making proper provisions for court reporters, as has been done in New Brunswick³⁰ and Nova Scotia.³¹

³⁰R.S.N.B. 1952, c. 209.

³¹R.S.N.S. 1954, c. 63.

CHAPTER 53

Privileged Communications

REPRESENTATIONS were made to the Commission urging that the law respecting privileged communications should be extended to cover many relationships which do not come within the present law of privilege. This is an area of law which comes within both the federal and provincial jurisdictions. The Canada Evidence Act¹ applies to criminal proceedings and other matters coming within federal jurisdiction, and the Ontario Evidence Act² applies to all matters coming within the jurisdiction of the Legislature. The federal Act, however, contains this provision:

“36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply, to such proceedings.”³

It is a question for judicial determination as to how far this section would give power to the provinces to make alterations in the common law of evidence which would be applicable in the enforcement of federal law, e.g., the criminal law. It is not necessary for us to enter upon a discussion of this matter.

¹R.S.C. 1952, c. 307.

²R.S.O. 1960, c. 125.

³R.S.C. 1952, c. 307, s. 36.

There is an unquestioned area to which the jurisdiction of the province extends, i.e., the evidence in civil cases, prosecution of provincial offences and evidence in provincial inquiries. To do justice in any trial, whether civil or criminal, the first task of the court is to search for truth and find where it lies, as far as it is practicable to do so. Where limitations are put on the admissibility of credible and relevant evidence, the search for truth has been circumscribed and the risk of reaching a wrong decision has been enhanced.

A forensic inquiry is not a scientific investigation. To arrive at scientific or physical truth, it may be essential that a scientist examine everything which relates to the problem confronting him and for him to explore every approach which may lead to a solution. Such an investigation is not practical in the judicial process. What was said in *Attorney General v. Hitchcock*⁴ is equally true today:

“If we lived for a thousand years instead of about 60 or 70, and every case were of sufficient importance, it might be possible, and perhaps proper . . . to raise every possible inquiry as to the truth of the statements made. . . . In fact, mankind finds it to be impossible.”

Nevertheless, within practical limitations, the rule should be that unless there are sound convincing reasons to the contrary, no relevant and cogent evidence which is necessary in order to ascertain the truth should be excluded.

There are two broad exceptions to the general rule. The first consists of a whole volume of rules of evidence designed to improve the quality of the evidence. The second exception is based on policy considerations that are extrinsic to the search for truth and are regarded to be of greater importance than that object.

Examples falling within the first exception are those rules which exclude certain types of relevant evidence because the quality is such that it cannot be relied on to strengthen the probabilities of the court ascertaining the truth. Hearsay evidence generally falls within this exclusionary rule because of the risk of relying on evidence not given under oath and not subject to cross-examination. Involuntary confessions fall

⁴(1847), 1 Exch. 91, 105.

within the same exception. They are excluded on the ground that threats or inducements are not a sound basis on which to establish the truth. Rules of this character are safeguards necessarily imposed, lest the search for truth be frustrated.

The second exception to the general rule consists of certain exclusionary rules which are not designed to advance the search for truth but, in fact, obstruct it. To justify such exceptions, the circumstances must be such that disclosure would be fraught with such mischief and collateral evils that the interests of abstract justice must be sacrificed. Falling within the second exception are three classes of exclusionary rules:

- (1) Those based on national security;
- (2) Those based on competency;
- (3) Those based on privilege.

The first requires little comment. The rule forbids disclosure of matters affecting national security. The security of the nation transcends the interests or rights of the individual.⁵

The second class has its origin in the theory of incompetency. It was not until 1898 that a person charged with an offence was a fully competent witness for the defence at every stage of the proceedings, whether he was charged solely or jointly with another person. During the eighteenth and nineteenth centuries there were many cases where incompetency prevented knowledgeable witnesses from testifying. Today there are few limitations on the ground of incompetency. In criminal cases, with certain exceptions, a spouse is not competent to give evidence against his or her spouse,⁶ and an accused person, though competent, may not be compelled to give evidence at his trial.

In the third class, with which we are here concerned, it is not incompetency of the witness that is involved; it is the exclusionary rule based on privilege. In such cases the witnesses may be both competent and compellable, but certain

⁵*Duncan v. Cammell, Laird and Co. Ltd.*, [1942] A.C. 624; Cross, *Evidence* (2nd ed.), 253.

⁶Canada Evidence Act, R.S.C. 1952, c. 307, s. 4 (2), as amended by Can. 1953-54, c. 51, s. 749.

evidence which they might give is excluded on the ground that the witness, by statute or common law, is privileged from making disclosure, or that the information has come to him in such confidential circumstances that he is not permitted to disclose the information without the consent of the confidant. Examples of the first alternative may be found in the Ontario Evidence Act, where it is provided that a witness in a proceeding instituted in consequence of adultery is not liable to be asked, nor bound to answer, questions tending to show that he has been guilty of adultery,⁷ and in the Municipal Act, where there is a provision that a voter cannot be required to state, in any legal proceedings questioning a municipal election, how he voted in the election.⁸ The representations made to this Commission had to do only with suggested extensions of the law of privilege now applicable to communications arising out of confidential relationships.

In this Province there are two special relationships to which the law of privilege applies: husband and wife, and solicitor and client. The privilege applying to the relationship of husband and wife is contained in the Ontario Evidence Act:

“11. A husband is not compellable to disclose any communication made to him by his wife during the marriage, nor is a wife compellable to disclose any communication made to her by her husband during the marriage.”⁹

A similar provision is contained in the Canada Evidence Act.¹⁰

GENERAL PRINCIPLES

In considering the representations made to the Commission, one must examine the basic principles on which the doctrine of privilege is founded. We start with the essential premise that the ends of justice demand full and frank disclosure of the truth. A claim for exemption must be founded on extraordinarily persuasive reasons showing that public necessity demands it. To support any claim for privilege, the communication must be made in confidence. But confidence

⁷R.S.O. 1960, c. 125, s. 10.

⁸R.S.O. 1960, c. 249, s. 128.

⁹R.S.O. 1960, c. 125, s. 11.

¹⁰R.S.C. 1952, c. 307, s. 4(3).

alone, no matter how strict, is not now sufficient to support such a claim. There was a time when obligations of honour were deemed to be a sufficient ground for maintaining silence, but this notion was abandoned two hundred years ago with the trial of the Duchess of Kingston.¹¹ No pledge of privacy nor oath of secrecy will by itself prevail against the demands for truth. The language of Dixon, J. (later Sir Owen Dixon, Chief Justice of Australia), sums up with clarity the law applicable to this Province:

"No one doubts that editors and journalists are at times made the repositories of special confidences, which, from motives of interest as well as of honour, they would preserve from public disclosure if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege [reference is then made to the relationships of husband and wife and attorney and client] . . . an inflexible rule was established that no obligation of honour, no duties of non-disclosure, arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box."¹²

Even though a witness under a legal duty to disclose what he knows may by disclosure suffer enmity, ridicule or disgrace, he must, if so directed by the court, make disclosure. However, the court has a discretion which may be exercised to lighten that burden. The court may in its discretion decline to order disclosure where the slight advantage gained by the testimony is outweighed by the damage which may result from its disclosure. This we shall discuss later in more detail.

SOLICITOR AND CLIENT

The solicitor and client privilege arises at common law and is of very ancient origin. The right to have an attorney

¹¹*The Duchess of Kingston's Case* (1776), S.C. 1 East P.C. 468; 168 E.R. 175.

¹²*McGuinness v. Attorney General of Victoria* (1940), 63 C.L.R. 73, 102-03.

prosecute and defend all "pleas moved for and against him" goes back to the fourteenth century. Originally, anyone properly appointed could act as an attorney for another. It was not until the fifteenth century that a close professional class emerged.¹³ The right to counsel is a right that is fundamental to equality before the law. Were it not so, those poorly educated and those not gifted with the power of expression would be at a disadvantage in all legal processes.

Originally the privilege applied only to communications passing between a client and his lawyer, if they were made with reference to actual or contemplated litigation. Later, the privilege was extended to include all communications, if they were made to enable the client to obtain or to be given legal advice irrespective of whether or not litigation was contemplated. Wigmore summarizes the scope of the privilege as follows:

"Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."¹⁴

There are exceptions to the privilege, e.g., where a client consults a lawyer to obtain advice in furtherance of a criminal or fraudulent purpose.¹⁵

The rationale of the solicitor and client privilege has been clearly expressed by Lord Brougham in *Greenhough v. Gaskell*:

"The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection . . . But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the sub-

¹³For historic references see Bellot, *The Origin of the Attorney-General*, 25 L.Q. Rev. 400 (1909).

¹⁴VIII Wigmore, *Evidence* (McNaughton rev. 1961), s. 2292.

¹⁵*R. v. Cox and Railton* (1884), 14 Q.B.D. 153; see also *R. v. Workman and Huculok*, [1963] 1 C.C.C. 297.

ject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.”¹⁶

Without the solicitor and client privilege the whole structure of our adversary system of administering justice would collapse, for the object of that system is that the rights of all persons shall be submitted with equal force to the courts. The only way that the imbalance between the learned and unlearned, the wise and foolish, can be redressed is that every man's case be brought before the courts with as nearly equal ability as possible. If a lawyer is to give useful service to his client, he must be free to learn the whole of his client's case.

The basis of the privilege between solicitor and client is not, therefore, that the relationship is confidential but that confidentiality is necessary to insure that the public, with safety, may substitute legal advisers in their place instead of having to conduct their own cases and advise themselves. Those who, by analogy, advocate a similar privilege for other confidential relationships overlook the fundamental difference that the legal adviser is the agent, the alter ego, of his client and that everything said by the client to his legal adviser is as if the client had said it to himself. That is the fundamental reason why the legal adviser, without the consent of the client, cannot disclose the communications made to him.

The essential difference between the solicitor and client privilege and other privileges claimed, with which we are about to deal, is that the former is an integral part of the due administration of justice, whereas the latter, if granted, obstruct the due administration of justice by excluding testimony thus hindering the search for truth. It may well be that the privilege now granted to the solicitor-client relationship is broader than is necessary for the public good. It is questionable whether it should extend beyond confidential communications made to the solicitor for the purpose of getting advice relative to the protection of the rights of the client against possible litigation or other proceedings.

¹⁶(1833), 1 My. & K. 98, 103; 39 E.R. 618.

CLERGY AND PARISHIONER

No privilege attaches at common law to communications made to a clergyman in his clerical capacity.¹⁷ This privilege has, however, been recognized in two provinces of Canada—Quebec and Newfoundland—and in New Zealand and Australia (States of Victoria and Tasmania), as well as in several states in the United States of America. The Quebec Civil Code provides that “the following persons cannot be obliged to divulge what has been revealed to them . . . by reason of their status or profession: (1) Priests and other ministers of religion; . . .”¹⁸ The Newfoundland statute reads: “A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional capacity.”¹⁹

It is not to be overlooked that the nature of the privilege is different in these two statutes. In each the privilege is that of the priest or clergyman, not of the one who gives the information. But under the Quebec statute there is a prohibition against divulging “anything revealed to them by reason of their status or profession”. This includes evidence that would be favourable as well as unfavourable to the confidant and the confidant cannot waive the privilege. The Newfoundland statute only applies to confessions. The strongest case based on policy that can be made for the privilege is that without it priests of the relevant faiths would be compelled to disclose what was communicated in the confessional. The secrets of the confessional are considered inviolate and will never be disclosed by the priest under any circumstances, including a direction by the court.²⁰

We think that statements made in the confessional, where the confessional is an integral part of religious practices, must be considered from a point of view different from disclosures made to clergymen in their pastoral capacities. No cases have been drawn to our attention, where in the history of the administration of justice in this Province, a priest has been asked to testify as to what has been revealed to him in the confes-

¹⁷*Normanshaw v. Normanshaw* (1893), 69 L.T. 468.

¹⁸Civil Code, Vol. 2, s. 308 (Quebec 1965).

¹⁹R.S.N. 1952, c. 120, s. 6.

²⁰XI *Catholic Encyclopedia*, 629.

sional. Until a court in this Province, or any other province, has ruled that a priest is compelled to testify as to communications made in the confessional, it would not appear that legislative action is necessary.

Communications made to clergymen, as friends or advisers, are on a quite different footing. It may be that the communication is made because there exists between the clergyman and the individual a pastoral relationship that has religious significance, or it may be that the communication is none other than a request for advice, such as might be made by a servant to his master, or by an individual to a social worker or other consultant. Where an individual has gone to a clergyman for wise advice, one asks the question: On what sound basis should the truth be suppressed and falsehood be allowed to prevail in such cases? We shall discuss this aspect of the matter when dealing with submissions made with respect to communications to social workers and others employed in similar professional capacities.

It is sufficient to say, at this stage, that no case was brought to the attention of the Commission where it was suggested that a clergyman of any faith had been called upon to testify in any proceedings as to confidential communications made to him, which he felt it improper to disclose.

PHYSICIAN AND PATIENT

The case for an extension of privilege based on the relationship of physician and patient is stronger where the communication is made during a psychiatric examination. We shall deal with the non-psychiatric examinations first.

The Province of Quebec is the only province in Canada which extends the doctrine of privilege to the physician and patient relationship. Unlike privilege extended to clergymen under the Quebec Civil Code, the patient may authorize disclosure of communications made to his physician.²¹ However, under the Physicians and Surgeons Act of the Province of Quebec,²² the prohibition against disclosure is absolute.

²¹Civil Code, Vol. 2, s. 308. (Quebec 1965).

²²R.S.Q. 1964, c. 249, s. 60(2).

We have had no representations made to us by members of the medical profession or others, from which a conclusion could reasonably be drawn that patients have received inadequate medical advice because they feared the attending physician might be called upon to testify as to communications made to him during a medical examination. Such a restriction could obviously cause great injustice to litigants. For example, in a personal injury case the previous history of the patient is very important. The patient may deny previous complaints of disability, which available medical testimony could prove without difficulty. The exclusion of such evidence would be an exclusion of the truth. Likewise the most cogent evidence of testamentary disability may be evidence of the attending physician based on communications with the patient.

The law in the United States, where communications between physician and patient are protected in many states, is fully discussed in *Wigmore on Evidence*.²³ In persuasive language, the learned author refutes all the arguments put forward in support of the law of privilege applying to the relationship of physician and patient, and comes to this conclusion:

"The injury to justice by the repression of facts of corporal injury and disease is much greater than any injury which might be done by disclosure."²⁴

"There is little to be said in favour of the privilege and a great deal to be said against it. The adoption of it in other jurisdictions is earnestly to be deprecated. A modern improvement in the present law—where a privilege exists—would be to adopt the North Carolina and Virginia rule which allows the court to require disclosure where necessary."²⁵

Apart from the psychiatric cases, no convincing evidence has been forthcoming to establish that the public interest is not being well served by the law as it now is, in so far as it relates to communications between physician and patient.

Some discussion has been raised by the decision of Stewart, J. in the case of *Dembie v. Dembie*.²⁶ It has been suggested that the character of a meaningful psychiatric

²³VIII Wigmore, *Evidence* (McNaughton rev. 1961), 818 ff.

²⁴*Ibid.*, 830.

²⁵*Ibid.*, 832.

²⁶Unreported, April 6, 1963, Ontario High Court of Justice.

examination is such that the examiner must have the fullest disclosure from the patient of all past history that may have any bearing on his disturbed condition of mind. It is contended that the public interest in the treatment of mentally disturbed patients is such that communications during their examination should be privileged. Stewart, J. expressed that view in the *Dembie* case. The learned judge stated that, if pressed to do so, he would not compel the witness—a psychiatrist—to tell what the patient had said to him during his examination. The decision was based in part on the ground that it would be a breach of the doctor's Hippocratic Oath, and in part on the necessity that a patient during a psychiatric examination must make full disclosure to the physician. The latter reason has a measure of validity, but the law cannot recognize any power in professional bodies to impose on their members declarations of secrecy (if they do) which would override the right of the individual to a disclosure of the truth before a court of justice. This would be an invasion of civil rights which ought not to be tolerated.

There may well be circumstances in which it would be most unfair to admit statements made by a patient to a psychiatrist whom he has consulted. On the other hand, in other cases it would be most unjust to exclude them. Where a psychiatrist has been called to give opinion evidence, it is essential that he should give the foundation for his opinion. Statements made by the patient very frequently form at least a part of the foundation. In testamentary cases, statements made to the examining physician are in themselves facts on which the court may base its decision. To exclude them by law would require very persuasive evidence of public necessity, which evidence has not been put before this Commission.

SOCIAL WORKERS

A most useful brief was presented by the John Howard Society of Ontario, supporting the contention that communications with social workers in their professional capacity should be regarded as privileged communications. The authors of the brief recognize the difficulty of defining a social worker by legislation, and an analogy is drawn—as is done by others

advocating the extension of the doctrine of privileged communications to other professions—to the privilege that exists between a solicitor and his client. For reasons that we have stated, the relationship of solicitor and client is not analogous to any other professional relationship.

The suggestion made is that the Ontario Evidence Act should be amended to provide the same privilege that is inherent in the solicitor-client relationship and

- (a) give the professional the right to make representation to the court, if he feels privilege should be granted in a particular case;
- (b) authorize the court to receive such representation and grant the privilege, if it is considered to be in the public good;
- (c) define who is a professional.

We think this suggestion is based on a sounder footing than those which would extend the absolute privilege of the solicitor-client relationship to other professional bodies. It would in fact give legislative direction to the discretion that is now exercised by the courts. A century ago Best, C. M. said:

“I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence.”²⁷

And today Stewart, J. exercised the same discretion in the *Dembie* case. We doubt the wisdom of the suggested legislative action. The difficulty in defining “who is a professional” would be great.

A case study of attitudes of confidence towards workers of the John Howard Society was set out in its brief. This revealed that there was some fear that the workers would betray the confidences placed in them, but no case was quoted where the confidence was used in court against the confidant. We think it would be unrealistic to give the protection of privilege to communications made to social workers. For example, if an individual stated to a social worker that he proposed to kill his wife, is it right that the social worker should be restrained by law from communicating that inten-

²⁷*Broad v. Pitt* (1828), 3 Car. & P. 518, 519.

tion to the proper authorities, or subsequently from testifying in court to the expressed intention? The protection of the solicitor-client relationship is not a basis on which to found such an extension of the doctrine of privilege.

WITHOUT PREJUDICE COMMUNICATIONS

Much has been said about communications to advisers with respect to matrimonial difficulties. These communications involve clergymen, physicians, psychologists, marriage counsellors and other social workers.

We think the approach to the solution of this problem lies not so much in legislation as in the development of the law as it applies to "without prejudice" statements. In *Mole v. Mole*,²⁸ Bucknill, J. J. said:

"... if the rule as to privilege tends to promote the prospects of reconciliation ... it ought to be applied."²⁹

Denning, L. J. said:

"... the principle ... applies not only to probation officers, but also to other persons such as clergy, doctors, or marriage guidance counsellors, to whom the parties resort with a view to reconciliation when there is a tacit understanding that the conversations are without prejudice."³⁰

This case has since been followed in England, and would no doubt be followed in Ontario. In *Henley v. Henley*, Sachs, J. said:

"... in a matrimonial dispute the state is also an interested party and is more interested in reconciliation than in divorce."³¹

With that overriding consideration in mind, the Court of Appeal in England has laid down that in certain circumstances intermediaries and conciliators are persons to whose evidence privilege is attached. One fundamental reason is that if privilege did not attach, those whom they sought to reconcile would tend not to be frank and this would be an impediment to reconciliation.

²⁸[1950] 2 All E.R. 328.

²⁹*Ibid.*, 329.

³⁰*Ibid.*

³¹[1955] 1 All E.R. 590, 591.

JOURNALISTS

In recent years efforts have been made to extend the doctrine of privilege to journalists. This claim is based on a foundation different from those we have been discussing. Privilege is not claimed for the protection of the informant on the ground that he has sought help or advice. In such cases the confidant does not intend that the information be made public; but in the case of the journalist it is otherwise. The information is communicated for the purpose of making it public. The only privilege that is claimed is for the source of the information. The ground on which this claim is put is that journalists would be impeded in their work as news gatherers and publishers if they were compelled to disclose the source of information communicated to them. It is contended that the public has a right "to know" and that if the source of information communicated to journalists is not protected, wrong-doing will go unexposed. If privilege were allowed in such cases, the court would be deprived of the right to verify the truth of such communications.

In *Attorney General v. Mulholland*,³² Lord Denning concisely summed up the matter in this way:

" . . . The newspapers had made these allegations. If they made them with a due sense of responsibility . . . then they must have based them on a trustworthy source. . . . And if they did get them from a trustworthy source, then the tribunal must be told of it. How otherwise can the tribunal discover whether the allegations are well founded or not? The tribunal cannot tell unless they see for themselves this trustworthy source. . . ."³³

DISCRETION

In all cases involving confidential communications, there is a residual discretion in the court to refuse to admit the evidence, although the communication may not be privileged in direct law. It was this discretion that Best, C. M. was exercising in *Broad v. Pitt*³⁴ when he said, "I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive

³²[1963] 2 Q.B. 477.

³³*Ibid.*, 487.

³⁴(1828), 3 Car. & P. 518, 519.

them in evidence.” One hundred and thirty-five years later, Donovan, L. J. in the *Mulholland* case said:

“While the journalist has no privilege entitling him as of right to refuse to disclose the source, so I think the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all: in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand—I prefer that expression to the term ‘necessary’. Both these matters are for the consideration and, if need be, the decision of the judge. And over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.”³⁵

In *Attorney-General v. Clough*,³⁶ Lord Parker, C. J. said:

“As I have said, certain classes of communication have been recognised as privileged. In the rest of a vast area, it must be for the court to ascertain what public policy demands. If, in the circumstances of any particular case it became clear that public policy demanded a recognition of some claim to privilege, then, as I conceive, it would be the duty of this court to give due effect to public policy and recognise the claim.”³⁷

In those circumstances I have without the slightest hesitation come to the conclusion that in regard to the press, the law has not developed and crystallised the confidential relationship in which they stand to an informant into one of the classes of privilege known to the law. As I have said, it still, as I conceive it, would remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune, and I therefore ask myself whether, in the circumstances of the present case, it is necessary from the point of view of public policy that I should recognise the claim to immunity which is raised.”³⁸

In the *Dembie* case, it was a discretion that Stewart, J. declared he would exercise to exclude the evidence of the con-

³⁵[1963] 2 Q.B. 477, 492.

³⁶[1963] 1 Q.B. 773.

³⁷*Ibid.*, 788.

³⁸*Ibid.*, 792.

tents of a communication to a psychiatrist. He based his discretion on the facts of that case. In another case, it might be that the communication to a psychiatrist would be an "imperative necessity of revealing the truth".

We are convinced that the injury that would be done to the administration of justice in the search for truth by an extension of the law of privilege, far outweighs any benefits that would be derived therefrom. The law if sufficiently understood is quite adequate. We recommend that no change in the law be made.

REPORTS MADE UNDER THE HIGHWAY TRAFFIC ACT

The Highway Traffic Act of Ontario³⁹ contains certain incongruous provisions creating privilege in civil matters, and at the same time compelling a person to make statements that can be used against him in criminal matters. The provisions are:

"143. (1) Every person in charge of a motor vehicle who is directly or indirectly involved in an accident shall, if the accident results in personal injuries, or in damage to property apparently exceeding \$100, report the accident forthwith to the nearest provincial or municipal police officer, and *furnish him with such information or written statement concerning the accident as may be required by the officer or by the Registrar.*"⁴⁰

Where the person in charge of the motor vehicle is physically incapable of making the required report, another occupant of the motor vehicle must make the report. A police officer receiving a report is required to secure from the person making the report, or by other inquiries, "such particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and such other information as may be necessary to complete a written report . . . to the Registrar. . . ." ⁴¹

In addition, the Registrar may require anyone having knowledge of an accident, and the parties thereto, to furnish

³⁹R.S.O. 1960, c. 172.

⁴⁰*Ibid.*, s. 143(1). Italics added.

⁴¹*Ibid.*, s. 143(3).

additional information "to establish, as far as possible, the causes of the accident, the persons responsible, and the extent of the personal injuries and property damage, if any, resulting therefrom."⁴²

The following provision has given rise to much difficulty in the administration of justice:

"143. (5) Any written reports or statements made or furnished under this section are without prejudice, are for the information of the Registrar, and shall not be open to public inspection, and the fact that such reports and statements have been so made or furnished is admissible in evidence solely to prove compliance with this section, *and no such reports or statements, or any parts thereof or statement contained therein, are admissible in evidence for any other purpose in any trial arising out of a motor vehicle accident.*"⁴³

These provisions impose both an unwarranted compulsion to give information and an unwarranted secrecy on evidence that should be available and admissible according to the ordinary laws of evidence. The person in charge of the motor vehicle, or in certain cases the occupant, is under compulsion to furnish a police officer with such information or written statements as may be required by the officer or the Registrar. In addition, the Registrar may require any person, whether involved in the accident or not, to furnish additional information. Any reports or statements made are not open for inspection, nor are they admissible in evidence in any trial arising out of the motor vehicle accident. We shall deal first with the injustice arising in the administration of the civil law because of these provisions.

The police officer is usually the first public authority to investigate a motor vehicle accident. He investigates it on behalf of the public and in the interests of all those who may be affected by it. The injured parties are very much interested in the investigation carried on by the police officer. Voluntary statements made immediately following the occurrence by those who have been involved in an accident, or by those who have witnessed an accident, are usually the best evidence of the truth. The officer, the public and the courts are interested

⁴²*Ibid.*, s. 143 (4).

⁴³*Ibid.*, s. 143(5). Italics added.

in truth but this legislation seals these statements, whether they are made by persons involved, or are obtained from the examination of any other person at the instance of the Registrar. This legislation puts a premium on reconstruction and falsification of evidence in the civil courts. The dependants of those who have been killed in a motor vehicle accident may be left with no means of knowledge of how the accident happened if they do not have access to the police reports and their counsel is not allowed to use them for the purpose of cross-examination in civil trials.

We now discuss the legislation in its relation to the administration of the criminal law. The usual criminal charges that are laid, arising out of motor vehicle accidents, are dangerous driving, criminal negligence, criminal negligence causing death, and manslaughter. This section of the Highway Traffic Act imposes a statutory obligation on the operator of a motor vehicle involved in an accident to furnish a police officer, or the Registrar, with such information or written statement concerning the accident as may be required by the officer or Registrar. If he refuses to do so, he is liable to a fine of not less than \$10 and not more than \$50. In addition, the Minister—not the courts—may suspend his licence or permit for an unstated time.

In so far as the criminal law is concerned, the exclusionary provisions of subsection 5, which we have quoted in full, have no application. It is not within the power of the provincial legislature to enact laws controlling the admissibility of evidence in criminal cases.⁴⁴ It is well settled that statements made under the compulsion of a statute are not by reason of that fact alone inadmissible in criminal proceedings against the person making them.⁴⁵ The injustice of these provisions of the Highway Traffic Act can be no more forcefully put than by Cartwright, J., now Chief Justice of Canada. In the *Marshall* case he said:

“The predecessor of what is now s. 110 [now s. 143] of *The Highway Traffic Act* was first enacted in 1930. At that time the rule embodied in many decisions, that a statement made under compulsion of a statute is not by reason of such com-

⁴⁴*Marshall v. The Queen*, [1961] S.C.R. 123.

⁴⁵*Ibid.*, 129

pulsion rendered inadmissible in criminal proceedings against the person making it, was by virtue of an Act of the Parliament of Canada, i.e., s. 10 of the *Criminal Code*, R.S.C. 1927, c. 36, part of the criminal law of the Province of Ontario, and that state of affairs is preserved by s. 7 of the *Criminal Code*, 2-3 Elizabeth II, c. 51. It follows that the protection accorded by s. 110 (5) to a person making a statement pursuant to s. 110, is effective in civil but not in criminal proceedings arising out of the accident in regard to which the statement was made.

That such a conclusion has anomalous results cannot be denied. If a person in charge of a motor vehicle is involved in an accident causing personal injuries under such circumstances that he may well be guilty of criminal negligence and is confronted immediately thereafter by a police officer he is entitled, under the maxim *nemo tenetur seipsum accusare*, to remain silent and indeed it is desirable that the officer before questioning him should give him the usual warning that he is not obliged to say anything (other than to give his name and address, as required by s. 221(2) of the *Criminal Code*); on the other hand it is his duty under s. 110, to furnish the officer with such information concerning the accident as the officer may require, and the information which he gives in fulfilment of this duty can be used against him if he is tried for criminal negligence. If it is thought undesirable that such anomalies should exist, they can be removed only by legislative action."⁴⁶

The only reason that we have been able to find for these objectionable statutory provisions is that the reports are required for statistical purposes. Statistical requirements ought not to be permitted to prevail over the elementary civil rights of the individual, the necessity for the search for truth in the courts, and the basic safeguards for the rights of accused persons.

The statistical requirements would be amply met if the statute did no more than impose an obligation to report a motor vehicle accident, identify the persons involved, and state the injuries sustained. All statements with respect to liability should be on a voluntary basis, open for inspection and admissible in evidence in any court according to the relevant laws of evidence.

⁴⁶*Ibid.*, 130.

RECOMMENDATIONS

1. No changes should be made in the law concerning privileged communications.⁴⁷
2. Section 143 of the Highway Traffic Act⁴⁸ should be repealed.
3. Any compulsion to make statements imposed on those involved in highway traffic accidents should go no further than to require them to report the accident and give the names of persons involved and known witnesses, together with a statement of injury sustained, if any.
4. All other statements concerning the accident should be on a voluntary basis, open to inspection and admissible in any proceedings according to the relevant laws of evidence.
5. The names of witnesses and statements made by them should likewise be open to inspection, and there should be no special statutory restraint on their admissibility in evidence in any proceedings.

⁴⁷The British Law Reform Committee came to the conclusion that, with the exception of limited privilege for patent agents, no further statutory privileges should be created in respect of other confidential relationships. Report of the Law Reform Committee (1967), Comnd. 3472.

⁴⁸R.S.O. 1960, c. 172.

CHAPTER 54

Reimbursement of Innocent Persons Suffering Wrongful Convictions

THE only statutory provisions which offer any form of redress to a person who is charged with a crime and who is subsequently found to be not guilty, are in the form of certain limited costs which may be awarded to him in provincial and federal summary conviction cases or in the case of proceedings by indictment for defamatory libel.

Under both the Summary Convictions Act¹ and the Criminal Code, the summary conviction court may, on dismissing an information, order the informant to pay reasonable costs to the defendant, which are not inconsistent with the schedule of fees in respect of items set out under section 744 of the Criminal Code.² In respect of provincial summary conviction offences, the costs awarded to the defendant at trial may include a counsel fee of not more than \$10.³

On appeal to the county or district court by way of trial *de novo*, the court is empowered to award reasonable costs to the defendant, including, in respect of provincial summary conviction offences, counsel fees and all necessary disbursements.⁴ In the event of further appeal to the Court of Appeal,

¹R.S.O. 1960, c. 387.

²Summary Convictions Act, R.S.O. 1960, c. 387, s. 9(2); Crim. Code, s. 716(1)(b).

³Summary Convictions Act, R.S.O. 1960, c. 387, s. 9(5).

⁴*Ibid.*, s. 17(4); Crim. Code, s. 730.

the court may make any order with respect to costs which it considers proper.⁵

Other than the foregoing and in cases of defamatory libel, no costs may be awarded either for or against a defendant in respect of trials or appeals in criminal cases.

But costs awarded in the discretion of the court do not constitute compensation or reimbursement to an accused person who is found to be innocent. Even the costs that may be allowed under the Summary Convictions Act, or Part XXIV of the Criminal Code, do not reflect the actual costs which may be incurred by an accused person in successfully defending himself. He is never entitled to costs against the Crown, and even when he is awarded costs against a private prosecutor they are inadequate. The \$10 counsel fee, which is the maximum stipulated by the Act, and the statutory tariff of scheduled items bear little relation to the financial outlay of the accused. Although on appeal by way of trial *de novo* the judge is empowered to make an order as to costs which he considers "just and reasonable", in practice the usual order is \$25 plus disbursements.⁶

Whatever may be said about the inadequacy of costs, the question remains: Should an innocent person receive *compensation* for being wrongfully convicted, and particularly if he suffers imprisonment as a result of a wrongful conviction?

There is presently no statutory scheme in Ontario similar to the schemes of many European countries, and those adopted federally and in many of the states of the United States. Denmark enacted compensation legislation as early as 1886, and Norway and Sweden passed similar legislation in 1887 and 1888 respectively. The United States enacted legislation in 1940. Individual states which have compensation legislation are New York, California, Illinois and Wisconsin. North Dakota had a scheme, modelled on the Wisconsin statute, but repealed it in 1965. In addition, Massachusetts has legislation awarding compensation for overlong detention before trial and acquittal.

⁵Crim. Code, s. 743(3).

⁶On appeals under the Summary Convictions Act, R.S.O. 1960, c. 387, s. 17 (4), a judge hearing the appeal may award "reasonable costs . . . including counsel fees and all necessary disbursements".

As is the case with respect to compensation for victims of crime,⁷ an accused or convicted person who has been proved to be innocent has little hope of obtaining redress by any civil remedy. Three relevant causes of action lie: actions for false arrest, false imprisonment and malicious prosecution. But these causes of action are hedged about with so many safeguards that it is only in rare cases that one who has been arrested, charged with a crime and convicted, can succeed in recovering damages. The onus is on the plaintiff to prove want of reasonable and probable cause or to prove malice or both. This onus is usually insurmountable.

Two principal arguments are usually advanced to support compensation for innocent persons who have been prosecuted or convicted for crimes:

(1) The right to compensation is analogous to that where private property has been expropriated. In such cases it is conceded that the owner is entitled to a reasonable compensation for his loss. In the case of wrongful conviction and imprisonment, the innocent person is deprived of his liberty and should be compensated for his loss of income and the cost of defending himself. The public interest involves the need to enforce the criminal law and the enforcement entails occasional errors, resulting in the punishment of innocent persons.

(2) The problem is analogous to that raised in industrial insurance. In the administration of the criminal law there are bound to be unavoidable accidents, and just as we have a scheme to compensate workmen who have been injured in the operation of industry, there should be a scheme to compensate the injured where accidents occur in the enforcement of law. It is contended that the costs of such accidents should fall on the whole community which benefits from the administration of the criminal law, rather than on the individuals suffering as a result of the accident.⁸

In the jurisdictions providing for compensation in the case of errors in the administration of criminal justice, the

⁷See Chapter 55 *infra*.

⁸See Borchard, *State Indemnity for Errors of Criminal Justice*, 21 Boston U. L. Rev. 201 (1942).

legislation varies widely. In the United States, and in those individual states which have dealt with the matter, compensation, within statutory limits, is awarded only to those who have been wrongfully convicted *and* imprisoned. At the other extreme, in the Scandinavian countries legislation makes provision for compensation for any material loss that may ensue from a charge or prosecution against an innocent person, whether or not a conviction results or imprisonment or detention is a consequence.

In Norway (in Denmark and Sweden the law is virtually identical) the Criminal Procedure Act of 1887 provides for compensation in three situations:⁹

- (1) Compensation may be awarded where the accused has suffered a "material loss" through a prosecution *per se*; that is, simply and solely because he has been wrongfully accused of a crime.

Under this heading he may, in the discretion of the court, recover compensation, even though the charge may be dropped or he is acquitted at trial. Compensation has been awarded under this heading, even where an accused has been acquitted on grounds of insufficiency of evidence, notwithstanding that he is suspect and may in fact be guilty.

- (2) Compensation may be awarded for any detention that an accused may undergo following a remand into custody.

This heading of compensation does not apply to an arrest itself or to detention consequent upon arrest and prior to remand. Thus, if a person is released without being remanded into custody, he is not entitled to compensation under this heading. He may, however, receive compensation in respect of any material loss which he may have suffered under the first heading.

If he is remanded into custody and the charge is later dropped or the accused is acquitted, he has, under this heading, an unconditional claim for compensation, provided only that he shows that it is "unlikely" that he committed the crime charged.

⁹Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 190 U. Pa. L. Rev. 833 (1961).

(3) If an accused has been actually convicted and has suffered a penalty as a result (not necessarily imprisonment) and he is later found not guilty of the crime for which the penalty was imposed, he apparently has an automatic right to compensation, even though grounds for suspicion of complicity may still exist.

This specific heading only covers the period for which punishment was imposed—that is, after sentence—but any prior detention or any material loss suffered as a consequence of the prosecution or charge may, in proper cases, be recovered under the other headings.

The statute does, however, provide for an overriding safeguard against abuse by stipulating that, in all cases, a condition precedent to compensation is that an accused, even though he may be innocent, shall not by any fault of his own cause a prosecution to be brought against him, or by his own fault have been responsible for any detention in custody. Thus, making a false confession or seeking to escape or seeming to tamper or influence witnesses, will all constitute absolute bars to compensation.

The Scandinavian schemes are administered by the courts themselves. This leads to some invidious consequences, such as two types of verdicts of acquittal. Thus, the court may acquit an accused at trial but, in its discretion, refuse to award compensation. The verdict of acquittal therefore carries a stigma, which would not be the case if compensation were granted in addition. Of necessity, too, there must be a re-investigation of all the evidence, in the case of appeals, both from the point of view of the legality of a conviction, and as to whether compensation can or should be awarded.

The rules, conditions and procedures which have been adopted in the United States are more realistic than the Scandinavian schemes.¹⁰ Since 1911, Massachusetts has made pro-

¹⁰The following schemes and legislation have been considered—United States: Unjust Conviction and Imprisonment Statute, 28 U.S.C., ss. 1495, 2513 (1940). New York: Court of Claims Act, s. 9(3a), McKinney Con. Laws of N.Y., Book 29A, Part 2. California: Cal. Penal Code, ss. 4900-06 (1913). Illinois: Illinois Annual Statutes, c. 37, s. 4378(c). (Smith-Hurd Supp. 1960). Wisconsin: Wis. Stat. Title 27 (1957), s. 285.05 (1913). North Dakota: North Dakota Century Code, c. 12-57 (enacted in 1917 but repealed in 1965).

vision for compensation to persons kept in confinement for more than six months awaiting trial, where they are eventually acquitted or discharged, if the delay in trial was not at their request or with their consent.¹¹

Any law providing for compensation for persons prosecuted for crimes and found not guilty must provide safeguards against its abuse.

The schemes that are in effect in other countries must be considered in the light of constitutional realities in Canada. The criminal law and criminal procedure are subjects over which the Parliament of Canada has exclusive legislative power,¹² while the civil right to compensation for wrongful prosecution or imprisonment is a subject over which the legislature of the province in question has exclusive legislative power.¹³

The problem is further complicated by the fact that under our system a verdict of acquittal, whether rendered by the court of first instance or by a court of appeal, is not a judgment declaring the accused innocent. In a criminal trial the accused is presumed to be innocent. That presumption may be rebutted only by proper evidence that establishes guilt beyond a reasonable doubt. The verdict of not guilty merely establishes that the onus imposed by law has not been met.

In the American jurisdictions, compensation may only be awarded if the accused is both convicted and imprisoned for an offence which he did not commit. This last condition does not mean the same thing as an offence for which he is eventually acquitted, or in respect of which his conviction is quashed or set aside. On applications for compensation the onus is upon the applicant to show that he was innocent in fact; i.e., either that the crime with which he was charged was not committed at all, or, if committed, was not committed by him. Under the various American schemes, this must be evidenced by a pardon of the Governor granted upon the stated ground of innocence, or by a certificate of the court rendering the verdict of acquittal, stating that the accused

¹¹See General Laws of Massachusetts, 1921, c. 277, s. 73.

¹²B.N.A. Act, s. 91(27).

¹³*Ibid.*, s. 92(13).

was innocent in fact as well as in law. Alternatively, in certain states, e.g., California, the claimant may establish his claim by proof before a special court or tribunal.

In addition, under the American scheme, it is a condition to a successful application that the accused show that he did not, by any act or omission on his part, either intentionally or negligently contribute to the events which brought about his arrest or conviction. This the applicant must establish either by proof before the tribunal authorized to award compensation, or in some cases by the production of a certificate of the court rendering the verdict of acquittal.

Except in New York State, an upper limit is placed upon the amount that may be awarded. Under the Federal Act it is \$5,000; under the Wisconsin statute, not more than \$1,500 for each year of imprisonment, with an aggregate not exceeding \$5,000; in North Dakota the respective limits were \$1,500 and \$2,000 under its former legislation; in California, \$5,000; in Illinois “. . . the court shall make no award in excess of the following amounts. For imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000; and provided further the court shall fix attorney fees not to exceed 25 percent of the award granted”.

The Federal statute, the Unjust Conviction and Imprisonment Act,¹⁴ is representative of the type of scheme which has been followed, but not precisely, where legislation has been adopted in the United States. The claims are heard by the United States Court of Claims, which is a special court vested with jurisdiction to entertain claims against the United States.¹⁵ A claimant must allege and prove that:

- (a) (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted . . . as it appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction, and

¹⁴28 U.S.C., ss. 1495, 2513 (1940).

¹⁵*Ibid.*, s. 1495

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in *forma pauperis*.

(e) The amount of damages awarded shall not exceed the sum of \$5,000.¹⁶

The jurisprudence under the Federal statute indicates that these conditions of compensation are strictly construed. A reversal of a conviction on grounds of insufficiency of evidence does not, therefore, entitle the claimant to compensation because it does not prove that he did not commit any of the acts of which he was charged.¹⁷

The administration of the Wisconsin and California schemes, which were introduced as early as 1913, differs somewhat from the Federal scheme (and from the New York scheme which also designates its Court of Claims as the court to entertain applications for compensation). In these states, administrative boards are constituted to hear the applications. These boards do not sit in review of the decisions of the courts confirming or reversing the convictions in question. Only evidence or circumstances discovered or arising after the conviction are open for consideration. In Wisconsin the onus is specifically laid on the accused to prove his innocence "beyond a reasonable doubt". Likewise the claimant must

¹⁶*Ibid.*, s. 2513.

¹⁷*U.S. v. Keegan*, 71 F. Supp. 623 (1947).

prove that he did not by his act or failure to act contribute to or bring about the conviction and imprisonment for which he seeks compensation. The North Dakota scheme, enacted in 1917 and repealed in 1965, was the same as the Wisconsin scheme. The final decision is not, as in Scandinavia, left to the court or courts originally involved in the case, nor are their decisions as such open to review or revaluation by the court or board entertaining applications for compensation. The American schemes have been designed to eliminate defects in the Scandinavian schemes.

The fact that so many jurisdictions in Europe and in the United States have passed legislation providing for compensation for innocent persons who have been accused of crime would indicate that there is need for some remedial legislation. The solutions of the problem that have been adopted in other countries do not indicate that they have imposed any heavy financial burdens on the state. Compensation seems to have been confined to the most flagrant instances of injustice.

When one has regard for the total number of convictions and acquittals in the United States, it would appear that the American schemes are so seldom employed that the efficacy of such schemes is considerably exaggerated. There have been no recoveries under the Federal statute of the United States in recent years. There was an award in the maximum amount of \$5,000 in 1954, and another in the amount of \$4,000 in 1955. At the time of writing this would appear to be the last case in which compensation was awarded.

The North Dakota scheme was never used from its enactment in 1917 to its repeal in 1965. Under the Wisconsin scheme, no compensation has been paid out since its enactment in 1913. Nothing has been paid out under the statutory scheme of New York, although the Attorney General of that state advises us that there have been cases where compensation has been paid under the authority of special legislation enacted by the legislature.

No awards have been made under the Illinois statute, but we were advised that several cases are now under consideration. There have been numerous instances in which

the legislature made awards to persons wrongfully imprisoned, but no figures relative to the amounts are available.

In California, in three of the last five years, no awards were made. In 1962 an award of \$5,000 was made, and in 1965 four awards were made, amounting to \$5,000, \$2,640, \$5,000 and \$5,000 respectively.

In Norway, where grounds for compensation are much broader, and where acquittal rather than innocence is often all that it is necessary to prove, the amount paid out in compensation is small. Over the five-year period from 1956 to 1961, only thirty-five persons were awarded compensation, and the total amount paid was the equivalent of \$45,000, or an average of \$1,300 for each claimant.¹⁸

Constitutional problems, to which we have referred, present real difficulties in establishing in Ontario any scheme patterned on those in effect in the United States and the Scandinavian countries.

In Canada, civil procedure could not be integrated with the criminal procedure, even if it should be considered desirable. The Federal Government defines the procedure to be followed in the criminal courts. It might well be that the Province could provide by appropriate legislation that a right to compensation should flow from a verdict of acquittal; but legislation providing for a second verdict or certificate that the court is satisfied that the accused is innocent—as distinct from the verdict “not guilty”—would engraft a civil procedure on to the criminal procedure which, in our view, would be beyond the power of the Legislature and undesirable. The Federal Government has prescribed the procedure to be followed in criminal cases. The Province cannot involve it in any procedure to establish civil liability.

Even if the Legislature had power to provide for a verdict of innocent or for a certificate of innocence to be issued by the court trying the case, the exercise of the power would create chaos in criminal trials. A two-pronged trial would have to be conducted: one prong pointing to a verdict of acquittal, and another to a certificate or verdict of innocence

¹⁸Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. Pa. L. Rev. 833, 839 (1961).

for the purpose of founding a claim for damages. The onus of proof on the first branch would be on the Crown to establish guilt beyond a reasonable doubt. On the second branch, the onus would be on the accused to establish his innocence, either on a preponderance of evidence or beyond a reasonable doubt.

Another formidable objection to the introduction into a criminal trial of any other issue than the issues of guilty or not guilty according to law, is that there would in fact be three verdicts possible:

- (1) Guilty;
- (2) Not guilty without compensation; and
- (3) Not guilty with a certificate for compensation.

Wherever an accused has failed to get a certificate on which to base a claim for compensation, he is left with a blight on his character, notwithstanding that he has been found not guilty. It could be said of him that the court found that his guilt had not been established beyond a reasonable doubt, but it was not convinced that he was innocent.

The alternative to the adoption of the Scandinavian scheme, or the Federal scheme of the United States, would be to establish a board of claims to which applicants might apply for compensation. For reasons given elsewhere in this Report, we do not think that such a board should be set up. If the right to compensation for wrongful prosecution, conviction or imprisonment is to be conferred, matters for judicial decision are raised of a character that should be decided in the courts. If trials of such matters cannot be disposed of in the courts, it is undesirable that administrative tribunals should be put in the position of reviewing the decisions of the courts.

The question remains: What procedure should be provided to compensate individuals who have been imprisoned through manifest error in the administration of justice? The answer to this question should be prefaced by a statement that all steps possible should be taken to see that manifest error does not occur. Adequate safeguards to prevent unnecessary imprisonment pending trial, an adequate legal aid system both at trial and on appeal, and a proper climate in

which to conduct criminal trials would all do much to reduce the incidence of error in the administration of justice. Where there is manifest error, provision should be made for compensation.

RECOMMENDATION

We recommend that statutory authority be conferred on the Lieutenant Governor in Council to make *ex gratia* payments on the recommendation of an *ad hoc* tribunal, consisting of judges of the Supreme Court of Ontario appointed from time to time to consider cases where it is claimed that a person has been imprisoned and that his innocence can be clearly established.

The few awards in those jurisdictions where compensation schemes have been in force for many years would indicate that any elaborate procedure which would tend to create confusion in the administration of justice is not warranted. Real injury to civil rights could result from the introduction into criminal procedure of any element of a civil claim for compensation.

CHAPTER 55

Compensation for Victims of Crime

THE subject of the compensation for victims of crime is divisible into two parts:

1. Compensation by the State for persons who have suffered injury as a result of the commission of crime;
2. Compensation by the State for those who have sustained injury or loss while engaged in law enforcement.

The idea of compensating victims of crime is not new. The penal codes of Babylon, Israel, Greece and Rome all required the criminal to compensate his victim with property or money. Compensable offences ranged from robbery and burglary to libel, slander, assault and murder. Compensation reached its zenith in Anglo-Saxon England during the seventh century. As the years progressed, kings eager to extend their authority, and with an eye on revenue, entered the field by imposing fines and imprisonment. A system of criminal law and criminal procedure developed, but it did not entirely extinguish the older system of personal feud. With the absorption of the concept of sin and penance into the penal law, punishment gradually replaced compensation as an expiation for crime, leaving to the victim of crime a remedy that, more often than not, is useless, that is, the right to proceed against the aggressor in a civil action.

The assumption that claims of the victim are sufficiently satisfied if the offender is punished by society becomes less

persuasive as an increasing emphasis is placed on the reformatory aspects of punishment. Not infrequently, in the public mind, the interests of the offender seem to be placed before those of his victim, and there is a strong feeling that justice has overlooked the latter while it has been concerned with the rights of the accused.¹

Three views are put forward in support of the contention that victims of crime should be compensated, at least for personal injury sustained through the commission of crime:

1. The State has undertaken to protect the individual from his aggressive neighbour, and when it fails to do so the victim of the aggressor should be compensated. It is suggested that by paying taxes to support police forces and other agencies of law enforcement, the public in a sense is financing an insurance scheme against crime, and consequently the individual member of the public deserves reimbursement for losses due to crime.
2. There is a basic inconsistency and injustice in a social and legal system which compensates a person injured in an industrial accident, even though his negligence may have contributed to the accident, but which requires him to bear all the costs of similar injuries resulting from a criminal attack, even though he is completely innocent.
3. As government becomes more and more committed to the concept of a welfare state with programmes for state education, health services, and unemployment relief, no great philosophical revolution is required for the acceptance of the principle that, within limits, the innocent victim of crime should also be compensated or given relief by the State.

In four jurisdictions — Great Britain, New Zealand, California, and Saskatchewan — schemes for compensation for victims of crime have been adopted.² A number of bills have

¹Penal Practice in a Changing Society, Home Office, (1959) Cmd. 645.

²Compensation for Victims of Crimes of Violence, Home Office, March 1964, Cmd. 2323, as amended by H.C. Written Answers, *Hansard*, June 24, 1964; Criminal Injuries Compensation Act, 1963 (N.Z.), c. 134; Welfare and Institutions Code, 1965 (Cal.), c. 1549, s. 11211; Criminal Injuries Compensation Act, Sask. 1967, c. 84.

been introduced in the United States Congress from time to time to provide compensation for victims of crime, and a bill on the subject is currently under study in the State of Wisconsin.³

In Ontario some remedies are provided under the present law, enabling victims of crime to recover for their injuries, but there are few effective remedies. There is the civil remedy of an action for damages against the offender, but often he is unknown or judgment proof because of poverty. There are provisions in the Criminal Code requiring reparation by the offender to the victim, but these are quite ineffective and in any event are confined to compensation in respect of property offences and for loss of property.⁴

After careful consideration, we have come to the conclusion that the first branch of the subject, the matter of general compensation for victims of crime, does not come within our Terms of Reference. It is a social problem quite similar to many others that have been met by different types of welfare legislation. The subject is not directly related to "unjustified encroachment on freedoms, rights and liberties by the Legislature, the government, its officers, servants, divisions of public service, boards, commissions, committees or other emanations of government, or bodies exercising authority under or administering the law in Ontario". We think this branch of the subject ought not to be further dealt with in this Report other than to make reference to the submissions which have been made to the Commission, and to the fact that the subject has been dealt with in Great Britain, New Zealand, the State of California and Saskatchewan. It is also under consideration in other jurisdictions.⁵

The second branch of the subject comes strictly within our Terms of Reference. In addition to peace officers, all private citizens are given powers of law enforcement, and in

³In the 89th Congress, 1st Session: Senate: R. W. Yarborough, S. 2155; House of Representatives: E. Green, H. R. 11818; W. D. Hathaway, H. R. 11552; S. M. Matsunaga, H. R. 11291; G. E. Brown, Jr., H. R. 10896.

⁴Crim. Code, ss. 373, 628, 629, 630, 638 and 714.

⁵For a full discussion on the subject, reference is made to an article entitled "Compensation to Victims of Crimes of Personal Violence", by Professor J. L. J. Edwards, Director of the Centre of Criminology of the University of Toronto, dated March, 1966. See also Compensation for Victims of Crimes of Violence, a report by Justice (1962), 4.

certain cases they are obliged to assist in the enforcement of the law. No useful purpose would be served by cataloguing these powers at this time. Illustrations are sufficient for our purposes. Anyone may arrest without a warrant a person whom he finds committing an indictable offence.⁶ Anyone may arrest without a warrant a person whom he, on reasonable and probable grounds, believes has committed a criminal offence and is escaping from and is freshly pursued by persons who have lawful authority to arrest that person.⁷ Anyone who is the owner of, or a person in lawful possession of, property may arrest without a warrant a person whom he finds committing a criminal offence on or in relation to that property.⁸ Everyone is guilty of an indictable offence and liable to imprisonment for two years if he omits without reasonable excuse to assist a public officer or peace officer in the execution of his duties in arresting a person, or in preserving the peace, after having reasonable notice that he is required to do so.⁹

The obligation of the State to compensate private citizens for injuries sustained in the enforcement of the law should be considered apart from its obligations towards constables and police officers. The latter are under a contractual relationship with the State. The former are not, but they are either required by law or empowered by law to co-operate in law enforcement. To oblige a private citizen to assist a peace officer in the execution of his duty in arresting a person, or in preserving the peace, or to empower a private citizen to arrest a wrongdoer and not provide for adequate compensation for injuries or property loss sustained, while performing his public duty, is an unjust encroachment on his civil rights. The principle of compensation in the cases where a person is by law required to assist a public officer or police officer in effecting an arrest or preserving the peace, has been adopted in Ontario in the Workmen's Compensation Act which provides:

"122. For the purposes of this Act, every person who under clause *b* of Section 110 of the *Criminal Code* (Canada) is required to assist in arresting any person or in preserving the

⁶Crim. Code, s. 434.

⁷*Ibid.*, s. 436.

⁸*Ibid.*, s. 437.

⁹*Ibid.*, s. 110(b).

peace shall be deemed to be an employee of the Crown in right of Ontario and his average earnings shall be deemed to be the same in amount as his average earnings at his regular employment but in any case not less than \$30 per week and not more than \$6,000 per annum."¹⁰

Compensation to those who are injured or suffer loss in assisting in the prevention of crime should not be *ex gratia*, or on a merely humanitarian basis. Citizens should be actively encouraged to assist in the enforcement of the law. As early as 1826, provision was made in England for the payment of money to dependants of persons killed while endeavouring to apprehend persons charged with certain serious, enumerated offences, i.e., murder, shooting or stabbing a person, poisoning, abortion, rape, burglary, robbery and arson.¹¹

The provisions of the Workmen's Compensation Act are quite inadequate and unrealistic.

In the first place, the Act is limited to those cases where the person injured is *required* to assist in arresting any person or in preserving the peace. Before he is required to act under the Criminal Code,¹² he must have reasonable notice that he is required to do so. The result is that a citizen who observes a police officer being beaten and goes to his rescue and is injured while assisting the officer in the execution of his duty, receives no compensation, while one who does so after the officer has called for his help does receive compensation if injured. In any case, the maximum compensation under section 122 of the Workmen's Compensation Act¹³ is entirely inadequate in the circumstances. This is an unjust law. The law makes no provision for damage to property. A citizen who assists a police officer by lending his automobile to him, or driving it for him, in an effort to apprehend one who has committed a criminal offence, and suffers the loss of his automobile, has no legal right to compensation.

There is no reason why the State should not fully compensate private citizens for injuries received or loss of property incurred while engaged in law enforcement duties, whether

¹⁰R.S.O. 1960, c. 437, s. 122, as amended by Ont. 1965, c. 142, s. 7.

¹¹Act to Improve Administration of Criminal Justice, 1826, 7 Geo. IV, c. 64.

¹²Crim. Code, s. 110(b).

¹³R.S.O. 1960, c. 437, s. 122, as amended by Ont. 1965, c. 142, s. 7.

obliged to do so or not. The unreasonableness of the law is demonstrated by reference to the Motor Vehicle Accident Claims Act¹⁴ which makes provision for State compensation for injuries sustained through the fault of uninsured motorists. If a private citizen is required by a peace officer to assist in apprehending a person who is fleeing from the commission of a crime in an automobile, and he is struck and injured by the automobile, he may be paid by the State an amount up to \$35,000, depending on the extent of his injuries. But if the same private citizen is shot while attempting to apprehend one fleeing from the commission of a crime in an automobile or on foot, his compensation, or that of his dependants in the case of his death, is limited by the provisions of the Workmen's Compensation Act (for dependants, \$75 per month). On the other hand, if the same private citizen was voluntarily exercising his powers of arrest as a good citizen, he would receive no compensation.

In Great Britain and California some progress has been made towards recognizing the legitimate claims of private citizens for injuries or damages suffered while acting in the enforcement of the law and for the benefit of the public. The British scheme is included in the Home Office Programme for Compensation for Victims of Crimes of Violence, to which we have referred, and it is administered by the Criminal Injuries Compensation Board. The scheme provides for the entertainment of applications for compensation in cases where:

"... the applicant, or, in the case of an application by a spouse or dependant ... the deceased, suffered personal injury directly attributable ... to an arrest or attempted arrest of an offender or suspected offender or to the prevention or attempted prevention of an offence or to the giving of help to any constable who is engaged in arresting or attempting to arrest an offender or suspected offender or preventing or attempting to prevent an offence. . . ." ¹⁵

The British scheme, although it restricts compensation to personal injuries, covers the complete range of citizen

¹⁴Ont. 1961-62, c. 84.

¹⁵Compensation for Victims of Crimes of Violence, Home Office, March 1964, Cmd. 2323, as amended by H. C. Written Answers, *Hansard*, June 24, 1964.

activity in the enforcement of the law or the prevention of crime. Unlike section 122 of the Ontario Workmen's Compensation Act, it is not confined to those cases where the injured party is required to assist a peace officer in effecting an arrest or preserving the peace. The British scheme even contemplates compensation in the case of a citizen's arrest or attempted arrest of a *suspected offender* or, in other words, a person who in fact may be entirely innocent of the commission of the crime. Under the Criminal Code, although not at common law, a private citizen has no power to make an arrest even on reasonable or probable grounds, unless the arrested person is actually found committing an indictable offence, or is believed on reasonable and probable grounds to have committed a criminal offence and is escaping and freshly pursued by persons having lawful authority to arrest that person.¹⁶ At common law, a private person could legally arrest an innocent person, provided that he had reasonable grounds for believing that such person had committed a felony, but only if in fact the felony had been committed by someone. He is protected against a reasonable mistake as to the individual, but not as to the felony, and takes the risk that none in fact had been committed.

There are two objections to the British scheme: (1) It does not include property losses. (2) The same minimum limits that apply to compensation for victims of crime are made equally applicable to injuries suffered by persons in the enforcement of the law. These minimum limits are too high. The injury must be serious enough to cause at least three weeks' loss of earnings, or alternatively it must be an injury for which compensation of not less than fifty pounds would be awarded.

Whatever justification there may be for limits of this sort in the case of compensation for victims of crimes, there is no justification for such limitation on compensation for those who have been injured while acting in the interests of public safety. Translated into Canadian terms, a citizen under the British scheme could be away from work and incur medical expenses up to \$100 and receive no compensation.

¹⁶Crim. Code, ss. 434, 436.

In California, provision is made for compensation for property loss as well as for personal injuries to the extent of the loss or damage suffered, without any limitations. It is a scheme of indemnification and goes much beyond the restricted plan provided in Ontario by the Workmen's Compensation Act. The California legislation may be summarized briefly as follows. In the event that a private citizen incurs personal injury or damage to his property in preventing the commission of a crime against the person or property of another, in apprehending the criminal or in materially assisting a peace officer in the prevention of a crime or the apprehension of a criminal, the private citizen or a law enforcement agency acting on his behalf may file a claim for indemnification for such injury or damage with the State Board of Control.¹⁷ The scheme is separate from and is not to be confused with California's scheme for compensating victims of crime. This we think is the proper approach. What is required is provision for full compensation.

So far we have dealt with the problem apart from the provisions of the Law Enforcement Compensation Act, 1967.¹⁸ This Act is stated to be an act to provide compensation for injuries received by persons assisting peace officers. It is an attempt to give a further remedy for persons injured while assisting peace officers. The Act makes provision for a Law Enforcement Compensation Board to consider claims made under the statute. The jurisdiction of the Board is defined as follows:

- "3. (1) Where any person is injured or killed by any act or omission of any other person occurring in or resulting directly from assisting a peace officer, as defined in the *Criminal Code* (Canada), in arresting any person or in preserving the peace, the Board may, on application therefor and after a hearing, make an order in its discretion exercised in accordance with this Act for the payment of compensation, and the decision of the Board is final and conclusive for all purposes.
- (2) An application may be made by and compensation may be paid to,
- (a) the victim;

¹⁷California Penal Code, s. 13601, enacted by 1965 (Cal.) c. 1395, s. 1

¹⁸Ont. 1967, c. 45. At the time of writing this Act was not yet in force.

(b) a person who is responsible for the maintenance of the victim and who suffers pecuniary loss or expenses as a result of the injury;

(c) where the death of the victim has resulted, the victim's dependants or any of them.¹⁹

4. (1) Compensation may be awarded by the Board for,

(a) expenses actually and reasonably incurred as a result of the victim's injury or death;

(b) pecuniary loss to the victim as a result of total or partial incapacity for work;

(c) pecuniary loss to dependants as a result of the victim's death;

(d) pain and suffering;

(e) other pecuniary loss resulting from the victim's injury and any expense that, in the opinion of the Board, it is reasonable to incur.

(2) Clause *d* of subsection 1 does not apply in respect of compensation awarded to a relative of the offender or a member of the offender's household."²⁰

This is a half-way measure in an attempt to do further justice, but it fails to provide an adequate remedy.

The Board "*may . . . make an order in its discretion exercised in accordance with this Act*".²¹ In the first place, it is not clear whether this discretionary remedy is intended to replace the legal right under the Workmen's Compensation Act, where it arises. If it is, it would appear to be a retrograde step to replace a legal right with a discretionary remedy. In the second place, no right of relief is given for property loss. In the third place, no means of compensation is provided for one who voluntarily undertakes to effect an arrest, unless he is "assisting a peace officer". For example, if *A* observes *B* beating and robbing *C* and intervenes to arrest *B*, as he has a legal right and moral duty to do, and is injured, he has no right to compensation, either under the Law Enforcement Compensation Act or the Workmen's Compensation Act.

We think the principle of setting up a Board with discretionary powers to consider these claims is wrong and quite unnecessary. Private citizens who perform legal police services

¹⁹*Ibid.*, s. 3.

²⁰*Ibid.*, s. 4.

²¹*Ibid.*, s. 3(1). Italics added.

should have legal rights to compensation. They are not under contracts of employment with the government and ought not to be bound by the limitations of the Workmen's Compensation Act or the Law Enforcement Compensation Act. Simple justice demands that an obligation be imposed on the Province to pay to all those, not being peace officers, who have sustained injuries or property damage while engaged in the enforcement of law, just and full compensation recoverable in the courts. There would be very few of these cases and in most cases fair settlement would be arrived at by negotiation rather than procedure before another administrative board.

RECOMMENDATIONS

1. Persons who sustain injury or property damage while engaged in assisting peace officers in arresting any person or in preserving the peace, should be given a legal right to be compensated by the Province.
2. Persons who sustain injury or property damage while exercising their legal rights to effect an arrest or preserve the peace should be given a legal right to compensation by the Province.
3. Such rights to compensation should extend to dependants.
4. Where the right to compensation or the amount of compensation cannot be settled by negotiation, the claimant should have a right of action in the courts against the Province.

CHAPTER 56

Compensation for Jurors and Witnesses

COMPENSATION FOR JURORS

FEES or compensation paid to jurymen have an interesting history. In England, at the beginning of the fifteenth century, the successful party in civil actions was allowed to entertain the jury after the trial, the quality of entertainment depending upon the estate and quality of the jurymen. This practice continued until 1623, when entertainment of the jury was, by custom, commuted to a payment of money. Instead of dinner and drinks, each jurymen became entitled to eight pence. At that time a labourer received about two pence per day as wages and a sheep could be purchased for six pence. This compensation for jurymen was substantial and even lavish.¹ The lavishness diminished with the depreciation of the purchasing power of eight pence, but it continued to be standard until 1949, and was the amount paid to jurymen at *nisi prius*. In the High Court in London jurors were allowed one shilling per day from 1736 onward.

In criminal cases it was improper for a prisoner to compensate the jury in any way as that would be a criminal offence—embracery. The Crown had a real financial interest in ensuring that jurors were not tampered with as long as the

¹*Payment of Jurymen* (1948), 206 L.T. 179.

accused's property was liable to escheat upon his conviction for a felony and deodands might be claimed by the Crown.

Until 1870 jurors in English criminal cases were treated with extraordinary severity. They were not allowed fire or refreshments until they came to a verdict, and they were liable to be taken with the judge on circuit on assize until they came to an agreement. In 1870 Parliament provided that "jurors, after having been sworn, may, in the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court, and be allowed reasonable refreshment . . . to be procured at their own expense".² It was not until 1949, in England, that any provision was made for the remuneration of jurors trying criminal cases, either at the quarter sessions or the assizes.³ No provision was made for the compensation of grand juries up until the time grand juries were abolished in 1933.

While jurymen have been treated more humanely in Ontario than in England, they have not been paid fees in proportion to the importance of their role in the administration of justice, the time and labours involved, and the economic loss which a jurymen suffers while performing jury duty.

The highest jury fee in Ontario is \$10 a day plus traveling expenses of 10¢ per mile, and reasonable living expenses up to \$8 per night, if a jurymen is unable to return to his home in the evening.⁴ These are the fees and allowances which are paid to grand jurors attending sittings of the Supreme Court, or a Court of General Sessions of the Peace, and to petit jurors attending in these courts, as well as in the county courts.

In each case the fees are paid by the local municipality if the trial is held in a county, and by the Province in respect of trials in the provisional judicial districts. In order to help the counties defray the expenses of fees paid to the petit jurors, the Jurors Act provides for the creation of a special fund. Every party entering an action for trial by jury in the Supreme

²1870, 33 & 34 Vict., c. 77, s. 23.

³Juries Act, 1949, 12 & 13 Geo. VI, c. 27, s. 1.

⁴Jurors Act, R.S.O. 1960, c. 199, s. 83.

Court or county court is required to pay a jury fee of \$3 and \$1.50 respectively. The sums are paid into a jury fund, together with all fines imposed upon jurors for non-attendance.⁵ These amounts are paid over to the treasurer of the county, subject to any agreement between the corporation of the county and the corporation of the county town. From the fund each petit juror is paid the sum to which he is entitled.⁶ If these funds prove insufficient to pay the jury fees, the county is required to find the necessary revenue from other sources.⁷ Presumably, the fund is to be used for the payment of petit jurors in both civil and criminal cases. It is quite clear, however, that the fund will only provide a small fraction of the jury fees which the county is obliged to pay.

Jurors attending in the division courts and on coroners' inquests are paid \$6 per day and 10¢ a mile.⁸ In addition, coroners' jurors are paid living expenses to a maximum of \$8 a night if a jurymen is obliged to remain away from home overnight.⁹

The subject of division court juries has been dealt with fully in Chapter 42 of this Report.

The fees of coroners' juries are paid by the county, city or separated town in which the inquest is held, or by the district where an inquest is held in a provisional judicial district outside a city.¹⁰

Provision is made in the Surrogate Courts Act¹¹ for a jury in surrogate court cases. Seldom, if ever, is the right to have a jury exercised. Presumably these jurors are paid as county court jurors, that is, \$10 a day, 10¢ a mile, and a maximum of \$8 for overnight expenses if necessary.

It is quite clear that the present scales of fees for jurors do not provide fair compensation in accordance with contemporary wage scales. The following table shows the average

⁵*Ibid.*, ss. 88(1), 89.

⁶*Ibid.*, ss. 84(1), 88(2).

⁷*Ibid.*, s. 90.

⁸Division Courts Act, R.S.O. 1960, c. 110, s. 196(1).

⁹Coroners Act, R.S.O. 1960, c. 69, s. 37(4), Schedule B, as amended by Ont. 1960-61, c. 12, s. 14, and Ont. 1965, c. 20, s. 14.

¹⁰*Ibid.*, s. 38(3).

¹¹R.S.O. 1960, c. 388, s. 29.

hourly rates of pay for the Province in six skilled trades. In some trades, in some areas, the hourly rate is much higher:

Carpenter	\$2.97
Electrician	2.90
Machinist	2.95
Mechanic	2.76
Truck Driver	2.30
Welder	2.94

The average is \$2.80 per hour or \$22.40 for an eight-hour day.

The hourly rate for labourers is \$2.17 per hour or \$17.36 for an eight-hour day.

There is the view that a good citizen is expected to assist in the administration of justice and should be prepared to submit to inconvenience and to make financial sacrifices when required to act as a juror. Most jurors recognize this duty and are quite willing to make reasonable sacrifices, but they should not be called upon to subsidize the administration of justice at the expense of providing necessities for their families. The hardship of jury service bears most heavily on a jurymen who is a wage earner as distinct from a jurymen who is paid a salary. The latter usually continues to draw his salary while performing jury service; on the other hand, the hourly-rated wage-earner usually serves on a jury at a substantial sacrifice. This is especially true when he is called upon to serve on a long case. Some cases last for several weeks and even months.

It has been brought to our attention that some union contracts provide that the employer is required to make up the difference between what is received by the jurymen for jury fees and what he would have received had his employment not been interrupted. Similar agreements appear to be quite common in the United States.¹² However, only a relatively few jurors are covered by such agreements and none of the self-employed is. In any case, it is not right that the burden of subsidizing the administration of justice should be merely shifted from employees to employers.

¹²⁸ Lab. L. J. 95 (1957).

It is common practice in the United States for jurymen to be excused from service on the ground of financial hardship.¹³ We do not recommend that economic hardship should be a ground for exclusion from jury duty. That is quite contrary to the whole concept of the jury as a democratic institution. The answer is that no jurymen should suffer severe economic hardship by reason of jury service. To attain justice for jurymen, two things should be done:

1. The Provincial Government should assume the entire financial responsibility for jury fees and allowances. This will be accomplished if the recommendations made in Section 5 of this Part are adopted.

2. Jury fees and allowances should be increased to an amount which will provide a reasonable minimum compensation for the time, personal inconvenience, expenses of attendance and loss of earnings which jurors suffer by reason of jury service. In the Province of New Brunswick, the allowance for jury service was increased from \$8 per day to \$15 per day and twenty cents per mile travelling allowance in 1966.¹⁴

ABOLITION OF JURIES IN CIVIL CASES

It is a matter for serious consideration whether any civil cases other than those arising out of defamation should be tried by a jury. This is especially true in ordinary personal injury cases. Under the present law, one party to an action may put the other party to the expense of a jury trial by merely filing a jury notice and paying a nominal fee of \$3 in a Supreme Court action and \$1.50 in a county court action. A jury trial increases the length of a trial by at least one-half, if not more, and increases the burden of costs on the unsuccessful party.

In England, with the exception of actions for defamation, the trial of civil cases by a jury can be said to be almost extinct.

Very few civil cases are tried by jury in the other provinces of Canada. In Nova Scotia, in the county courts where the civil jurisdiction extends to \$10,000, juries are used occa-

¹³*Ibid.*

¹⁴N.B. 1966, c. 71, s. 15.

sionally in one county court, and in seventeen other counties rarely, if at all. It is estimated that the number of civil cases tried by jury in the Supreme Court of Nova Scotia would not amount to more than five per cent of all civil cases tried, and would probably be as low as two per cent. In New Brunswick, counsel for the Attorney General could not recall one civil case tried by a jury in the last ten years. In Prince Edward Island, about two civil cases are tried by a jury in a year. In Quebec, if the amount claimed exceeds \$5,000, trial by jury may be had in certain cases. A request for a jury must be accompanied by the deposit of an amount required to meet the indemnity to which the jurors are entitled, and other disbursements necessitated by this mode of trial. The result is that few cases are tried by a jury. The departmental solicitor of the Attorney General of Manitoba advised the Commission that "civil cases are almost never tried by a jury. . . . There have been three civil jury trials since 1951". In Saskatchewan, the party requiring a jury must deposit with the Local Registrar such sums as the Local Registrar considers sufficient for payment of jurors' fees and the expenses of summoning them. In the past year, six cases were tried by a jury in that province. In Alberta, it is rare that a civil case is tried by a jury. In British Columbia, the right to have civil cases tried by a jury is quite wide. About ten per cent of the civil cases are tried by a jury in that province. These percentage figures are unsatisfactory as we do not have the breakdown showing the nature of the ninety per cent of the cases which are not tried by a jury.

The conclusion we have come to is that the trial of civil cases by a jury is a procedure that has outlived its usefulness in Ontario. Instead of the jury being used as a protection for the weak, it is now a weapon in the hands of the strong. The uncertainty of the verdicts of jurors increases the hazards of litigation. This uncertainty is a very compelling force brought to bear on the inexperienced litigant when considering settlement with a formidable and experienced opponent. In most personal injury cases the plaintiff is opposed by an opponent of great experience. The conclusion we have come to is that the trial by jury in all civil cases, except those based on defamation, should be abolished.

COMPENSATION FOR WITNESSES

Whatever may be said in favour of the view that jurors should be expected to render a public service at a substantial financial sacrifice—if required to do so as part of the administration of justice—the same cannot be said with respect to the duty of witnesses who are required to attend at trials in the courts or before administrative tribunals. No doubt a witness owes a public duty to make himself available to give evidence, but he ought not to be required to subsidize the administration of justice.

Witnesses, other than qualified experts, attending criminal trials at the instance of the Crown in the Supreme Court, General Sessions of the Peace, County Court Judges' Criminal Court, before a magistrate trying an indictable offence or conducting a preliminary hearing, and in proceedings before a grand jury, receive \$6 a day, 10¢ a mile travelling allowance, and up to \$8 per night living expenses if they cannot return home at the end of the day. Doctors, lawyers, engineers, accountants, surveyors, and architects receive \$15 a day as a basic fee where they testify in a professional capacity.¹⁵ In exceptional cases, the Attorney General may increase these sums so that a witness will be reasonably compensated for his attendance at the trial, and he may also order that a special fee be paid to an expert witness.¹⁶ Where a witness lives outside the province, the Attorney General may likewise direct that he be paid reasonable compensation.¹⁷

In summary conviction cases before a magistrate or a justice of the peace, witnesses are restricted to \$4 a day and 10¢ a mile. There is no provision for any further relief in exceptional cases.¹⁸

A witness, other than an expert, attending before a coroner's jury is entitled to receive \$6 a day, 10¢ a mile for transportation, and up to \$8 for overnight living expenses. Doctors, where they give evidence as practitioners, receive \$15 a day, and expert witnesses may receive up to \$30 a day, or

¹⁵Crown Witnesses Act, R.S.O. 1960, c. 84, s. 2(1) and Schedule thereto.

¹⁶*Ibid.*, s. 3.

¹⁷Administration of Justice Expenses Act, R.S.O. 1960, c. 5, s. 11.

¹⁸Crim. Code, s. 744.

even more if the Attorney General or Deputy Attorney General approves a higher fee.¹⁹

We agree with a submission made to this Commission on behalf of a large trade union:

“At the present level of wages, salaries and the cost of living, fees allowed to witnesses in all the courts are totally inadequate to compensate such persons for the time lost in court appearances. . . .

We understand the view . . . that it is the duty of a citizen to render what assistance he can to the courts and that he should not expect to be compensated. The fact is, however, that whatever should be the feeling, most persons are reluctant to volunteer information that may lead to their being called as witnesses, at least partly because of the financial sacrifice involved, and to that extent justice is being hampered by the present niggardly allowances made to witnesses. This difficulty is compounded by the lack of attention paid to the convenience of witnesses and the uncertainty of the court calendars.”

A spokesman for the same union collected data from certain members of one of its locals who attended as witnesses at a hearing of the Ontario Labour Relations Board, which makes a practice, although not required to do so, of paying witnesses on the same basis as those attending in civil cases are paid, i.e., \$6 per day. The following illustrations of the financial loss assumed by wage-earners as witnesses were submitted:

July 20/65	Would have worked		
Adelard Goudreau,	8 hours @ 2.68	21.44	
Sudbury.	Received from OLRB	6.00	
	Loss		\$15.44
July 20/65	Would have worked		
George Flynn,	8 hours @ 2.52 $\frac{1}{4}$	20.18	
Sudbury.	Received from OLRB	6.00	
	Loss		\$14.18
July 14 to 21/65	Would have worked		
John Robert	32 hours @ 2.37 $\frac{1}{2}$	76.00	
Chartrand,	Received from OLRB	24.00	
Sudbury.	Loss		\$52.00

¹⁹Coroners Act, R.S.O. 1960, c. 69, s. 37(5) and Schedule C thereto.

July 15/65 Walter Turner, Sudbury.	Would have worked 8 hours @ 2.52 $\frac{1}{4}$ Received from OLRB Loss	20.18 6.00	\$14.18
July 14 to 16/65 Robert Fletcher, Sudbury.	Would have worked 24 hours @ 2.22 $\frac{1}{2}$ Received from OLRB Loss	53.40 12.00	\$41.40
July 15/65 Lionel Beaulieu, Coniston.	Would have worked 8 hours @ 2.64 $\frac{1}{2}$ Received from OLRB Loss	21.16 6.00	\$15.16
July 15/65 Robert Godin, Sudbury.	Would have worked 8 hours @ 2.22 Received from OLRB Loss	17.76 6.00	\$11.76

Two things emerge from these submissions:

1. There is no general statutory provision that witnesses are entitled to be compensated when appearing before statutory tribunals.
2. The amounts allowed as witness fees in the courts are entirely inadequate.

RECOMMENDATIONS

1. All witnesses other than qualified experts should be paid at the rate of at least \$15 per day, with proper travelling and accommodation allowances.
2. There ought to be a statutory obligation on statutory tribunals to pay witness fees for all witnesses summonsed at the instance of a tribunal.
3. Where witnesses are summonsed at the instance of a party to a cause before a tribunal, they should be entitled to be paid witness fees by the party requiring them to be summonsed.
4. Where costs are awarded against an opposite party, the tribunal hearing the matter should have power to disallow, as part of the costs, fees for witnesses unnecessarily called.

5. The scale of witness fees should be the same for all courts and tribunals.
6. The Provincial Government should assume the entire responsibility for jury fees and allowances.
7. Jury fees should be raised to provide adequate compensation for wage-earners requested to render jury service.
8. Juries for the trial of civil cases, other than those arising out of defamation, should be abolished.

Section 5

FINANCIAL RESPONSIBILITY FOR THE MACHINERY OF JUSTICE

INTRODUCTION

In the districts, the financial responsibility for the machinery of justice has always been assumed by the Province. In the counties the responsibility is a confused mosaic, much of which was designed to meet conditions when communities were isolated from one another and roads that were almost impassable formed the only means of communication, other than that afforded by rivers and lakes.

To understand many of the idiosyncrasies of the present system of financing the processes of justice in the counties, it is necessary to have some considerable knowledge of the historical development. This development has been one of improvisation, expediency and convenience relative to conditions that are quite unrelated to and inconsistent with modern requirements and efficiency.

Unless we indicate otherwise, our discussion in this Section will relate only to the administration of justice in the counties.¹

¹Since this Section of the Report was written the Prime Minister of Ontario has announced that the Province proposes to assume the share of the financial responsibility for the administration of justice now borne by the municipalities. At the time of going to press the necessary legislation has not been put before the Legislature. We therefore deal with the whole matter of the responsibility for the machinery of justice on the basis of the law as it now is. This course will make our recommendations and studies available to those who will be responsible for the necessary legislative programme. We emphasize, however, that our prime concern in putting forward our recommendations in this Section is not to relieve the municipalities of a financial burden but to advance the better administration of justice.

CHAPTER 57

Early History of the Financial Responsibility for the Machinery of Justice

By an order in council dated August 24, 1791, followed by the Constitutional Act of that year, the Provinces of Upper and Lower Canada were created.¹ The Province of Upper Canada was divided into four districts for the purpose of the administration of law and justice. These districts were subdivided into nineteen counties. The original districts were Lunenburg, Mecklenburgh, Nassau and Hesse. The names of these districts were later changed to the Eastern District, the Midland District, the Home District and the Western District respectively. The four districts remained the same in name but not in boundary, and four new districts were created in 1798: Johnstown, Newcastle, Niagara and London.²

It was the district that formed the primary entity. For each district the principal law officers were the sheriff, clerk of the peace and the justice of the peace.³

¹Kennedy, *The Constitution of Canada* (2nd ed.), 84.

²Statutes of Upper Canada 1798, 38 Geo. III, c. 5.

³The Boyd Commission Report, 1895; The Gregory Commission Report, 1921-22. The Boyd Report: Report of the Commissioners, under Chairman John Alexander Boyd, appointed to inquire concerning the mode of appointing and remunerating certain provincial officers, now paid by fees, and the extent of the remuneration they should receive. The Gregory Report: Interim Reports of the Ontario Public Service Commission, under Chairman W. D. Gregory, to inquire into, consider and report upon the best mode of selecting, appointing and remunerating sheriffs, etc.

In 1792 the Legislature provided for the construction of a gaol and court house in every district in the Province. The justices of the peace for each district were authorized to approve all necessary plans and enter into contracts for these purposes.⁴ It was provided that the district sheriff should appoint and discharge the gaoler and keeper of the gaol and court house. The justices of the peace at Quarter Sessions were empowered to make rules for the gaol and to fix an annual salary for the gaoler in lieu of fees from the prisoners confined in the gaol.

Legislation passed in 1793, which introduced the principle of local government in the Province, created a source of funds to meet the expenses of completing and maintaining a system of administering justice in Upper Canada.⁵ The legislation provided for an annual meeting of all ratepayers of each "parish, township or reputed township" having a population of more than thirty inhabitants to elect a town clerk, two assessors, a collector, no less than two and no more than six persons to hold the combined office of overseer of highways and roads and fence-viewer, a pound-keeper and two town wardens. The justices of the peace at Quarter Sessions were empowered to regulate the fees of every town clerk and pound-keeper, to appoint annually a high constable for each district and to appoint a sufficient number of constables for each parish and township. The justices at Quarter Sessions were further empowered to appoint a treasurer for each district who was required to account quarter-yearly to the justices.

A local tax was created to be payable by every landowner, the amount of which was based on the assessed value of his land as determined by the assessor. The collector, upon collecting the tax and after deducting three per cent thereof as his fee, was required to pay the same quarter-yearly to the district treasurer to be used by him, *inter alia*, after deducting three per cent thereof as his fees, to defray the expenses of building and maintaining a court house and a gaol, the payment of the gaoler's salary, the maintenance of the prisoners, and "for the fees of the coroner and other officers . . . and other necessary charges" within his district. Further legisla-

⁴Statutes of Upper Canada 1792, 32 Geo. III, c. 8.

⁵Statutes of Upper Canada 1793, 33 Geo. III, c. 2 and c. 3.

tion in 1794 provided that all moneys collected for fines which would otherwise have been paid to His Majesty were to be paid to the Province for its public uses and the support of its government.⁶

At this stage in the judicial evolution of the Province, justices of the peace in Quarter Sessions were vested with considerable authority. In addition to their duties as licensing and regulatory authorities, which would be comparable to the powers granted at present to municipal councils under the Municipal Act,⁷ and their powers to fix certain local taxes, they also acted as magistrates.⁸ Complementing the courts presided over by the magistrates were the Court of Requests, a small claims court established in 1792, the Court of Probate established in 1793, the District Court established in 1794, and the Court of King's Bench established in 1794.⁹

The Act¹⁰ which established the Court of King's Bench as a superior court of civil and criminal jurisdiction, superseding the former Court of Common Pleas, also established a provincial Court of Appeal and created a tariff of fees payable to the marshal, the crier and the sheriff. A provision in the statute is of particular interest. It made it a condition precedent, to the perfection of both civil and criminal appeals to the Court of Appeal, for the appellant to post security "that he will effectually prosecute his appeal and answer the condemnation, and also pay such costs and damages as shall be awarded in case the judgment or sentence appealed from shall be affirmed". This discriminatory clog on the administration of justice in the Province has long been abandoned in civil cases, but it still survives in the administration of penal justice in this Province, more than 160 years later.¹¹ Since the introduction of the revised Criminal Code in 1955, the courts have been relieved of their power to award costs in cases of indictable offences.¹² But this is not true in the case of summary

⁶Statutes of Upper Canada 1794, 34 Geo. III, c. 5.

⁷R.S.O. 1960, c. 249.

⁸The Boyd Report, 12-4.

⁹*Ibid.*

¹⁰Statutes of Upper Canada 1794, 34 Geo. III, c. 2.

¹¹Summary Convictions Act, R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1; Crim. Code, s. 724.

¹²*Regina v. Dominion Steel and Coal Corporation* (1957), 116 C.C.C. 117, *per* Judson, J. at 139.

offences. In addition to any other penalty that may be imposed by the court, a convicted person may be ordered to pay the costs of the judicial officers and persons who have taken part in bringing him before the courts, prosecuting him and conducting his trial.¹³

Another principle discernible in the legislation creating local government in 1793¹⁴ is that the payment of the costs of the administration of justice was to a large degree a local matter and, therefore, a municipal responsibility.

At the present time the responsibility for the payment of the costs of the administration of justice in the Province appears to be borne by the counties and the parties, but in reality that is not so. It is, however, significant to observe that the seeds of the present confused system were sown even before the turn of the nineteenth century when the Province was very sparsely settled, primarily rural, and the means of travel and communication were scarcely established. Relevant legislation has developed since that time on an *ad hoc* basis, dictated by a pragmatic view.

For example, an early illustration of the disposition of fines may be found in a statute passed in 1797 which provided for the licensing of vendors of liquor and of the owners of public houses.¹⁵ The Act established a penalty of twenty shillings for any person found guilty of selling liquor without a licence, one-half of which was payable to the informer and one-half to the Province. Another illustration is found in the statutes of 1816, whereby it was provided that fines collected from those convicted of committing certain offences on the highway were to be divided equally between the informer and the Province "for the support of the civil government thereof".¹⁶ Two offences had been created by previous legislation: the first required all persons travelling in sleighs or carriages on the highways or "beaten tracks", upon meeting another such traveller, to turn out to the right and give half the road; the second required two or more bells to be affixed to the

¹³See Chapters 39 and 51 *supra*.

¹⁴The Boyd Report, 14.

¹⁵Statutes of Upper Canada 1797, 37 Geo. III, c. 11.

¹⁶Statutes of Upper Canada 1816, 56 Geo. III, c. 11.

harness of every sleigh.¹⁷ This legislation was the precursor of the modern Highway Traffic Act,¹⁸ and the offences referred to now appear in sections 71 (1) and 43 (1).

A third illustration shows a different disposition of fines and penalties where purely local regulations or by-laws were broken. Legislation¹⁹ passed in 1817 established the towns of York (which became the City of Toronto in 1834),²⁰ Sandwich and Amherstburgh, and empowered the justices of the peace in Quarter Sessions of the district in which these towns were situate to pass "rules and regulations" concerning such matters as, *inter alia*, paving and lighting streets, the maintenance of slaughter houses, the causing of nuisances and the regulation of weights and measures. Penalties were provided for the breach of the rules and regulations. One-half of the penalty was to be paid to the informer and the other half to the treasurer of the district in which the infraction occurred, for the use of the *town* in which the infraction was committed. We shall see later that all of these illustrations, outdated by 150 years, are still reflected in the present laws of Ontario.

The Legislature of the day was also giving consideration to the way in which those charged with the administration of justice were to be paid. For example, in 1806 the Province was required to pay an annual salary of £50 each to the sheriffs of the districts of London, Niagara, Newcastle and Johnstown.²¹ (We have not found a provision for the method of payment of the other sheriffs in Upper Canada and it is presumed they were paid on a fee basis.) A major piece of legislation was passed in 1807.²² This Act established a tariff of fees payable to the clerks of the peace.²³ Section 2 of this Act provided:

"2. And be it further enacted by the authority aforesaid, that when any person or persons shall be convicted before any Court of Quarter Sessions in this province, of any assault

¹⁷Statutes of Upper Canada 1812, 52 Geo. III, c. 4.

¹⁸R.S.O. 1960, c. 172.

¹⁹Statutes of Upper Canada 1817, 57 Geo. III, c. 2.

²⁰Statutes of Upper Canada 1834, 4 Will. IV, c. 23.

²¹Statutes of Upper Canada 1806, 46 Geo. III, c. 1.

²²Statutes of Upper Canada 1807, 47 Geo. III, c. 11.

²³For example, *inter alia*: for attending each Quarter Session—£1, 10s.; for the preparation of a list of jurors per every 100 names—2s. 6d.; for drawing an indictment—10s.; for each subpoena—2s. 6d.

or misdemeanour, such person or persons so convicted, shall pay the costs of such conviction and prosecution, that shall be allowed and taxed by the said court; and when such defendant or defendants shall be acquitted, the prosecutor, unless it shall appear to the said court that there were reasonable grounds for prosecuting . . . shall pay such costs of prosecution as shall be allowed and taxed as aforesaid: Provided nevertheless, that when any defendant or defendants shall be tried on a presentment of the grand jury, and shall be acquitted, the costs shall be paid out of the district treasury. . . ."

This sets a pattern that is followed to a certain extent to this day.

In 1822 certain rules of practice were enacted pertaining to the Court of King's Bench.²⁴ The judges of the court were empowered to establish the "fees which shall and may be taken, or be allowed to be taken by any clerk of the Crown, counsel, attorney, sheriff, officer or other person from or in respect of any business . . . done or transacted in the Court of King's Bench, as well in civil causes as in criminal prosecutions. . . ." ²⁵ Every common juror was allowed a fee of 1s. 3d. for every cause in which he was sworn in as a juror, which fee was to be paid by the plaintiff or his attorney, but which was to be accounted for in costs by the party charged with the payment thereof.²⁶ Somewhat similar legislation was enacted in the same year concerning the reorganization of the district courts.²⁷ The Act made it lawful for the judge, commissioner, attorney, sheriff, clerk and crier to receive certain fees as set out therein.²⁸ A further provision fixed a fee of 6d. to be paid to jurors in all matters in which they were sworn.

Legislation passed in 1822 enabled the justices of the peace in Quarter Sessions for the Midland District to build "a good and sufficient gaol and court house" for the district in the town of Kingston.²⁹ To permit them to do so, they were empowered to borrow the sum of £3,000, and to appropriate annually not less than £300 from the rates collected in the district, to be used to pay the interest on the loan. This Act is

²⁴Statutes of Upper Canada 1822, 2 Geo. IV, c. 1.

²⁵*Ibid.*, s. 45.

²⁶*Ibid.*, s. 30.

²⁷Statutes of Upper Canada 1822, 2 Geo. IV, c. 2.

²⁸*Ibid.*, s. 28.

²⁹Statutes of Upper Canada 1822, 2 Geo. IV, c. 21.

typical of several similar Acts passed during this period providing for the construction of gaols and court houses in the various districts, and for the borrowing of funds to do so.³⁰

Diversity as to the disposition of fines collected has previously been illustrated.³¹ However, yet another means for the use of fines was soon established. All fines levied in the Court of Requests (the precursor of the present Division Court) were to be paid to the overseer of highways in the division in which the fine had been levied, to be applied for the improvement of highways.³² A similar provision was made for fines collected from those persons summarily convicted of common assault, petty trespass and disturbing religious worship.³³ Quite significantly, in 1830 it was provided:

“That in all cases in which, by the criminal law of England in force in this province, the whole or any part of any fine or penalty imposed for the punishment of any offence, is in any manner appropriated for the support of the poor, or to any parochial or other purpose, inapplicable to the existing state of this province, such fine or penalty, or such part thereof as shall be so appropriated, shall be paid, when received, to the treasurer of the district in which the conviction shall have taken place, to be appropriated to the purposes of the district. . . .”³⁴

While the judges of the Court of King’s Bench were paid by the province out of public funds,³⁵ and some sheriffs were apparently also paid by the Province,³⁶ most of the other officers concerned with the administration of justice were dependent for their salaries upon the fees which they collected, pursuant to tariffs for that purpose, from the parties benefiting from their services.

³⁰See, for example, Statutes of Upper Canada 1823, 4 Geo. IV, c. 23 (London District); Statutes of Upper Canada 1837, 7 Will. IV, c. 40 (a goal for the Home District).

³¹Statutes of Upper Canada 1797, 37 Geo. III, c. 11; Statutes of Upper Canada 1816, 56 Geo. III, c. 11; Statutes of Upper Canada 1817, 57 Geo. III, c. 2.

³²Statutes of Upper Canada 1833, 3 Will. IV, c. 1.

³³Statutes of Upper Canada 1834, 4 Will. IV, c. 4.

³⁴Statutes of Upper Canada 1830, 11 Geo. IV, c. 1.

³⁵See, for example, Statutes of Upper Canada 1831, 1 Will. IV, c. 14; and Statutes of Upper Canada 1837, 7 Will. IV, c. 1.

³⁶Statutes of Upper Canada 1806, 46 Geo. III, c. 1; Statutes of Upper Canada 1823, 4 Geo. IV, c. 25, wherein the sheriff of the Bathurst District was granted an annual salary of £50.

In addition to the examples previously discussed, in 1827 a tariff of fees was established for justices of the peace in relation to their duties in the trial of summary offences and offences under penal statutes,³⁷ and in 1833 a tariff of fees was established for commissioners, clerks and bailiffs of the Court of Requests.³⁸ In 1837 the Court of Chancery was established,³⁹ and the following year the vice-chancellor and the judges of the Court of King's Bench were authorized to establish a tariff of fees to be taken by the officers of the court.⁴⁰

Following the Rebellion of 1837 and the report of Lord Durham, Upper and Lower Canada were reunited on February 1, 1841.⁴¹ The reunion of the two Provinces marked a distinct turning point in the evolution of municipal government and a different approach with regard to the payment of the costs of the administration of justice. This is all reflected in the consolidation of the statutes of the Province in 1859.

It is helpful to review the changes that took place after 1840. In the City of Toronto, which had been incorporated in 1834, many matters of local concern became the legislative responsibility of the municipal council.⁴² Section 77⁴³ established a novel and unique court of record for the City of Toronto known as "the Mayor's Court", presided over by the mayor, assisted by the aldermen and clerk of the council, having the same jurisdiction over crimes and misdemeanours occurring within the city as had the Court of General Quarter Sessions. This experiment lasted for only twelve years.⁴⁴

The Union Act of 1840 made provision for incorporating all the inhabitants of the several districts, with legislative

³⁷Statutes of Upper Canada 1827, 8 Geo. IV, c. 7, as amended by Statutes of Upper Canada 1834, 4 Will. IV, c. 17. The criminal law of England, as it stood on September 17, 1792, was made the criminal law for Upper Canada: Statutes of Upper Canada 1800, 40 Geo. III, c. 1. See also Statutes of Upper Canada 1829, 10 Geo. IV, c. 2, which established a tariff of fees payable to justices of the peace and constables for the apprehension and detention of absconding debtors.

³⁸Statutes of Upper Canada 1833, 3 Will. IV, c. 1.

³⁹Statutes of Upper Canada 1837, 7 Will. IV, c. 2.

⁴⁰Statutes of Upper Canada 1838, 1 Victoria, c. 14.

⁴¹Union Act, 1840, 3 & 4 Victoria, c. 35.

⁴²Statutes of Upper Canada 1834, 4 Will. IV, c. 23.

⁴³*Ibid.*

⁴⁴The Boyd Report, 15.

power to be exercised through the council, composed of warden and councilors, for each district. Councilors were to be selected and the warden and district treasurer were to be appointed by the Governor. The accounts of the district treasurer were subject to quarterly audit by the district auditors.⁴⁵

In keeping with the new policy of turning over to the local authorities the control of matters of local concern, the power was given to the local council to make by-laws as to internal communication by roads, bridges and public buildings; the purchase and the sale of property for the district; the defrayal of the expenses of the administration of justice within the district; the fixing of the remuneration of all district officers appointed under the Act; and the determination of the amounts of fees and salaries to be received by township officers.

⁴⁵Earlier provision had been made requiring the justices of the peace for the various districts and towns within them to prepare an annual accounting of all revenues received and expended and to make the same public: Statutes of Upper Canada 1822, 2 Geo. IV, c. 13; Statutes of Upper Canada 1827, 8 Geo. IV, c. 4.

CHAPTER 58

Intermediate History of the Financial Responsibility for the Machinery of Justice

IN 1846 a major change occurred when the Legislature provided that the expenses of the administration of criminal justice in Upper Canada, previously paid by local taxation, were thereafter to be paid out of the public funds of the Province.¹ Thus the expenses formerly payable out of district funds to the clerk of the peace, sheriff, coroner, constable, crier, and others, became a charge on the general treasury. The consolidation of the statutes in 1859 shows how the legislation stood for many years following 1846.

The administrative officers and staff of the superior courts of civil and criminal jurisdiction consisted of a clerk of the Crown and pleas, a clerk of the process, and a number of deputy clerks, all of whom were appointed and paid by the Province. Their salaries were fixed and they were prohibited from retaining any fees collected by them. These were paid over to the Provincial Treasury.^{1a} Similar provisions applied to the officers of the Court of Chancery, including the Office of the Master in Ordinary, with the exception that local masters and deputy registrars functioning outside of Toronto were permitted to retain for their own use all the fees of office received by them which did not belong to any fee fund.² The

¹Statutes of Upper Canada 1846, 9 Victoria, c. 58.

^{1a}C.S.U.C. 1859, c. 10, s. 29.

²C.S.U.C. 1859, c. 12, ss. 11, 15.

clerk of the Court of Appeal was restricted to an annual salary and was not permitted to retain any of the fees of his office.³

A different system prevailed in the county courts.⁴ Two general schedules of fees were established which were to be paid by litigants. For example, upon issuing a writ the litigant was required to pay two fees, one fee to be remitted by the clerk of the court to a general fee fund to be applied towards the payment of the salaries of the county court judges, and a second fee to be retained by the clerk for his own use. The legislation also set a schedule of fees payable to the sheriff for his own use. In the division courts, the clerks and bailiffs were paid by fees.⁵ This system still exists.

The county attorney, also known as the crown attorney, was appointed as the receiver of all fees and fee fund moneys from the county, surrogate and division courts in his county.⁶ The Province was required to appoint a county attorney for each county. It was his responsibility "to aid in the Local Administration of Justice, and to perform the duties by this or any other Act assigned to County Attorneys."⁷ He was entitled to retain for his own use four per cent of the gross sums so received by him. The purpose of the funds he received was to provide for payment of the disbursements required on account of the county and division courts, including the salaries and travelling expenses of the county court judges. Any surplus of fees was paid to the province, but if the fees proved to be inadequate, the Province was required to make up the deficiency.

Practice and procedure in the superior courts and county courts was governed by legislation⁸ of the same nature as the present Judicature Act⁹ and the present Rules of Practice and Procedure established pursuant thereto. The superior court judges were empowered to establish a tariff of costs and fees for counsel, attorneys, sheriffs, coroners and officers applicable in the county and superior courts.

³C.S.U.C. 1859, c. 13, s. 65.

⁴C.S.U.C. 1859, c. 15.

⁵C.S.U.C. 1859, c. 19.

⁶C.S.U.C. 1859, c. 20.

⁷C.S.U.C. 1859, c. 37, s. 1.

⁸C.S.U.C. 1859, c. 22.

⁹R.S.O. 1960, c. 197.

At this time a special surcharge was payable in all proceedings taken in the Court of Queen's Bench, Common Pleas, Chancery and Appeal, and in the Practice Court.¹⁰ For example, the surcharge on the issuance of a writ was 50¢; on every judgment entered, 60¢; on every bill, \$2.40; on every appeal entered, \$4.00, etc. The Law Society of Upper Canada entered into a covenant with Her Majesty on June 26, 1846, to provide in Toronto "Buildings suitable for the accommodation of the Superior Courts of Law and Equity in Upper Canada for all time to come".¹¹ The Society had borrowed the sum of \$224,000 from the Province for this purpose, and the surcharge was required to liquidate this obligation. It is not clear from the statutes how long the surcharge continued.

The payment of jurors was essentially the responsibility of the county or of any city or town not separated from the county for judicial purposes. Each county was required to establish a fund for the payment of jurors, and contributions to the fund were made by litigants upon the setting down of an action for trial, and by accused persons assessed costs upon their convictions. In addition, all fines and penalties imposed under any statute that were not made payable to the Province or to any municipal corporation, and all fines payable by jurors for non-attendance, were to be paid into the fund. Where any fund proved insufficient for the payment of jury fees, the county, city or town was required to make up the deficiency. Grand jurors were paid such daily sums as were established by the county as reasonable; petit jurors received \$1.00 per day, plus mileage of 10¢ a mile. In addition, those persons charged with the responsibility of empanelling a jury were paid established fees.

The Act under which the Province assumed the costs of the administration of criminal justice in 1846,¹² provided:

"1. The whole of the expenses of the administration of Criminal Justice in Upper Canada shall be paid out of the Consolidated Revenue Fund of this province.

¹⁰C.S.U.C. 1859, c. 33.

¹¹*Ibid.*, s. 6.

¹²C.S.U.C. 1859, c. 120.

2. All accounts of or relative to the said expenses shall be examined, audited, vouched and approved under such regulations as the Governor in Council, from time to time, directs and appoints.

3. The several heads of expense mentioned in the Schedule to this Act, shall be deemed expenses of the administration of Criminal Justice within the meaning of this Act."¹³

The schedule presents a tariff of fees payable by the Province to clerks of the peace, sheriffs, coroners, constables and criers for certain duties performed by the respective officers. In addition to these items, the Province was also required to assume financial responsibility for the maintenance of prisoners confined on criminal charges, a proportion of the salary of the gaoler of each county gaol, medicines, fuels and other necessities for prisoners in a gaol, the transportation of prisoners to the penitentiary, and all other charges relating to criminal justice payable to the foregoing officers as authorized by any act prior to June 9, 1846, and payable out of county funds.

While the Province assumed the costs of the administration of criminal justice in relation to the matters set out in the statute of 1846, nevertheless the local municipalities were required to provide at their own expense the physical accommodation to house the courts, the court offices and officers, and the gaols. These matters are set out in the legislation governing municipal institutions, known as the Municipal Institutions Act.¹⁴ The Province was divided into a number of counties and each county was administered by a county council.¹⁵ A city or town was permitted to withdraw from the jurisdiction of the council of the county in which it was situated and establish its own municipal government. Every city and town which had withdrawn from the jurisdiction of the county council was deemed to be a county for municipal and judicial purposes as provided in the Municipal Institutions Act.

Every county and city council was given the power to enact by-laws for the erection, improvement and repair of a

¹³*Ibid.*, ss. 1-3.

¹⁴C.S.U.C. 1859, c. 54.

¹⁵Territorial Divisions Act, C.S.U.C. 1859, c. 3.

court house, gaol, house of correction and house of industry upon municipal property. However, where a city or town used a county court house or gaol for its own purposes, it was required to pay to the county for this privilege such sum as was mutually agreed upon or established by arbitration. Similar powers were given to every county and city council with regard to lock-up houses which were used to imprison persons summarily convicted by justices of the peace, and those awaiting transit to the common gaol of the county.

The Act also contained provisions to constitute in every city a court of record known as the Recorder's Court, presided over by a recorder, or, in his absence, by the mayor assisted by aldermen, and having the same jurisdiction as Courts of Quarter Sessions of the Peace with respect to "crimes and offences committed in the city and as to matters of civil concern therein". The expenses of the administration of justice in criminal cases in the Recorder's Court were to be paid by the Province.¹⁶ In addition to the Recorder's Court, another court was established, presided over by the local justice of the peace, the police magistrate or the mayor. This court had jurisdiction to try anyone charged with the breach of any local by-law. Any fines collected in the latter court were shared equally by the informer and the municipal corporation.

The Municipal Institutions Act further provided that every city and town was to establish a police office. The local police magistrate, if one had been appointed, was required to attend at the office daily. The payment of local police officers was made the responsibility of the local municipality. In every city a Board of Commissioners of Police was constituted, consisting of the mayor, recorder and police magistrate. The members of each police force were hired by, were under the control of and were responsible to their local board.

The officer charged with the responsibility of the institution and conduct of all prosecutions in the Quarter Sessions and the Recorder's Court, and summary proceedings before magistrates for offences committed in breach of provincial statutes, was the county, or crown, attorney.¹⁷ While it was then the custom for the Attorney General to assign barristers

¹⁶Municipal Institutions Act, C.S.U.C. 1859, c. 54, s. 381.

¹⁷County Attorneys Act, C.S.U.C. 1859, c. 106.

to conduct prosecutions in the Assizes, the county attorney was required to expedite such prosecutions and to assist therein if necessary. The county attorney was paid for his services on the fees basis. In all cases of misdemeanour, the accused, if convicted, might be assessed by way of costs, *inter alia*, the fees of the county attorney. In all cases of felony and where the accused was not assessed costs or was acquitted or was unable to pay the costs, the fees were paid by the Province. The county attorney was required annually to file with the Minister of Finance an account of all emoluments received by virtue of his office in the preceding year.

Many statutes made provision that the fines imposed upon conviction were to be used for a variety of purposes. Where no such provision was made for the appropriation of a fine imposed for an infraction of the criminal law of England in force in Upper Canada, and where by the law of England the fine was to be used to assist the poor or any other purpose applicable to the existing state of Upper Canada, such fine was to be paid to the county or city in which the conviction took place.¹⁸ Similarly, all fines imposed for a breach of statutes having the force of law in Upper Canada only, formed part of the Consolidated Revenue Fund where no provision was otherwise made for the appropriation of the fine.

Another important statute¹⁹ dealt with the payment of the costs of the administration of justice in Upper Canada in other than criminal matters.²⁰ It is important to draw a distinction between the "administration of justice in criminal matters" and the general administration of justice. The former relates to all proceedings required to be taken where there was an offence against the criminal law of England, which law had been incorporated into the law of Upper Canada. The latter relates to all other judicial proceedings, not only where civil redress was sought, but also those involving infractions of provincial statutes and municipal by-laws, some of which might be labelled "criminal" in modern terminology.

¹⁸Appropriation of Fines Act, C.S.U.C. 1859, c. 118.

¹⁹Fees of Counsel Act, C.S.U.C. 1859, c. 119.

²⁰As to criminal matters, see the Expenses of Administration of Justice In Criminal Matters Act, C.S.U.C. 1859, c. 120.

Where not otherwise provided by law, the Courts of the Queen's Bench and Common Pleas could establish a tariff of "the fees to be allowed to any Clerk of the Crown, Counsel, Attorney, Sheriff, or other officer or person for or in respect of criminal and exchequer matters".²¹ The fees at that time fixed for sheriffs, coroners, clerks of the peace, constables and criers, for services rendered in the Quarter Sessions, were confirmed. It was made an offence for any officer to demand and receive any greater fee than that established by the tariffs. The imposition of costs in addition to fines was authorized. Anyone convicted of a misdemeanour in the Quarter Sessions was liable to pay costs, but if acquitted the costs "when not otherwise provided by law, [were to] be paid out of the County funds".²² There were to be no costs awarded against any person convicted of a felony, but all costs in every such case "when not otherwise provided by law [were to] be paid out of County funds".²³ The fees which justices of the peace and their clerks were permitted to take, and the costs to be charged in all cases of convictions where fees were not expressly prescribed by any statute, were set out.²⁴

The Act also contained the priorities with regard to the distribution of county funds.²⁵ The treasurer was required to expend the funds in the following order:

- (a) The costs of maintaining and repairing the court house and gaol, the expenses attendant to the care of the prisoners in the gaols, and any costs dealing with "any other purpose whatever connected with the administration of justice within the County".
- (b) The amount of the fees payable out of the county funds when duly allowed by the magistrates in Quarter Sessions assembled.
- (c) The expenses of levying and collecting and managing the rates and taxes imposed in the county.

At this stage in the development of the Province, substantial areas were virtually unsettled and had no form of

²¹Fees of Counsel Act, C.S.U.C. 1859, c. 119, s. 1.

²²*Ibid.*, s. 4.

²³*Ibid.*, s. 5.

²⁴*Ibid.*, ss. 11, 12.

²⁵*Ibid.*, s. 7.

municipal government. Nevertheless, some provision was necessary for the administration of justice in these unorganized tracts.²⁶ All costs attendant thereto were borne by the Province. The Governor was given authority to proclaim certain areas as temporary judicial districts presided over by a stipendiary magistrate, who exercised the jurisdiction of a justice of the peace and a division court judge. Other areas were proclaimed provisional judicial districts. In these the Province provided buildings to be used as gaols and court houses. Provision was made for the holding of assize courts in these districts, and a sheriff was appointed. In addition, a judge and a justice of the peace were appointed who exercised the jurisdiction of a county court judge and a magistrate respectively.

Prior to 1867 the Province of Canada had complete legislative power over criminal and civil matters.²⁷ As stated previously, the criminal law in Upper Canada was the criminal law of England as it existed on September 17, 1792.²⁸ In 1867, with the passage of the British North America Act, the criminal law, including procedure in criminal matters, was assigned to the Parliament of Canada.²⁹ The administration of justice, including the constitution of courts of criminal jurisdiction and the imposition of punishment for enforcing any law of the Province, was assigned to the Province.³⁰

When the British North America Act came into force on July 1, 1867, the criminal law of England, as it stood on September 17, 1792, remained the criminal law of the Province of Ontario, with the exception of such provisions as were superseded or displaced by federal legislation.³¹

While it is true that in 1869 and thereafter the Parliament of Canada did enter the field of criminal law and enacted

²⁶Administration of Justice in Unorganized Tracts Act, C.S.U.C. 1859, c. 128.

²⁷Union Act, 1840, 3 & 4 Victoria, c. 35, s. 3.

²⁸Statutes of Upper Canada, 1800, 40 Geo. III, c. 1.

²⁹B.N.A. Act, s. 91 (27).

³⁰By the joint operation of s. 91(27) and s. 92(14)(15) of the B.N.A. Act. See Varcoe, *The Constitution of Canada* (1965), 121ff.

³¹Lefroy, *Canadian Constitutional Law* (1918), 54.

certain laws relating thereto—e.g., acts relating to criminal procedure, forgery, larceny, perjury, offences against the person and offences against the coinage—it was not until 1892 that the criminal law was codified.³² The code was modelled on the English Draft Code of 1878 prepared by Sir James Fitzjames Stephen.³³ Unless altered by statute, the criminal law of England remained the law of Ontario³⁴ until the revised Criminal Code was adopted in 1954. Under the 1954 code, the criminal law of England in force in any province immediately before the code came into force, continued to exist in part only. It is not applicable to provide any offence except that of contempt of court, but it exists to provide defences to any charge and procedure where not prescribed by statute.³⁵ All criminal offences except that of contempt of court are now contained in the Criminal Code or other federal legislation.³⁶

By 1877 a definite pattern was clearly emerging as to the responsibility for the payment of the costs in the administration of both civil and criminal justice in the Province. The general outline was:

- (1) The local municipalities were responsible for the costs of erecting and maintaining gaols and lock-ups, together with court houses in which both civil and criminal justice was administered, and for the payment of the salaries of magistrates.
- (2) The individual litigants were responsible for paying the disbursements involved in the conduct of civil litigation, and the provincial government was responsible for paying the salaries of some court officers and clerks, while other court officers and clerks were paid on the fee basis. The salaries of judges were paid by the federal government.
- (3) The provincial government was responsible for the payment of *most* of the costs incurred in the administration of criminal justice.

³²Can. 1892, c. 29.

³³Martin, *The Criminal Code of Canada* (1955), 1-2.

³⁴Crim. Code 1927, s. 10.

³⁵Can. 1953-54, c. 51, ss. 7, 8.

³⁶See generally Martin, *supra.*, at 1-15, 32-37; *Tremear's Annotated Criminal Code* (1964), 2-6, 57-61; *Crankshaw's Criminal Code of Canada* (1959), 16-22.

At this time the practice of requiring the counties and cities to erect and maintain court houses, gaols and lock-up houses was continued, with the county gaols remaining under the care and control of the county sheriff.³⁷

Every city or town having a population of more than 5,000 inhabitants was required to have a police magistrate, whose salary was paid by the city or town. The police magistrate's jurisdiction included certain criminal prosecutions and infractions of provincial statutes and local by-laws.³⁸ In towns of fewer than 5,000 inhabitants, the town council, by a two-thirds vote, could approve the appointment of a magistrate and the payment of his salary. In any event, the Lieutenant Governor in Council had an overriding power to appoint a police magistrate without salary for any city or town. Where a city or town did not have a police magistrate, the duties ordinarily performed by him were exercised by the justices of the peace of the county. Cases arising out of breaches of municipal by-laws were tried by a justice of the peace or the mayor of the city or town.³⁹ Magistrates appointed for temporary judicial districts were paid by the Province and in addition were permitted to retain for their own use all fees authorized to be taken by justices of the peace in summary conviction cases.⁴⁰

There was no uniform practice for remunerating court officers and clerks; some were paid salaries by the provincial government and others were allowed to retain the fees of their offices. This was the confusing result:

(1) In the Court of Appeal, the registrar was paid from the provincial treasury and all fees received by him were to be paid to the Province.⁴¹

(2) In the Court of Queen's Bench and the Court of Common Pleas, the Clerk of Process and all court clerks were

³⁷Territorial Division Act, R.S.O. 1877, c. 5; Municipal Institutions Act, R.S.O. 1877, c. 174, ss. 429, 430, 431, 432, 440, 442, 443, and 445.

³⁸Police Magistrates Act, R.S.O. 1877, c. 72.

³⁹*Ibid.*; Municipal Institutions Act, R.S.O. 1877, c. 174, ss. 396, 398.

⁴⁰Administration of Justice in Unorganized Tracts Act, R.S.O. 1877, c. 90, s. 3.

⁴¹Court of Appeal Act, R.S.O. 1877, c. 38, ss. 11 (2), 55.

paid by the Province and all fees collected by them became part of the provincial treasury.⁴²

(3) In the Court of Chancery all court officers were paid by the Province and all fees collected from litigants were paid over to the Province. But local masters, deputy registrars and commissioners were permitted to "retain to their own use all the fees of office which they respectively receive not payable to the Crown or belonging to any fee fund". They were not required to account to the Crown for any portion thereof.⁴³

(4) In the Surrogate Court, the court officers were paid by fees, and the Surrogate Court judge was also permitted to retain to his own use certain fees scheduled in the Act.⁴⁴

(5) In the Division Court, the clerks and bailiffs were paid by fees.⁴⁵

(6) In the Courts of Assize and Nisi Prius the deputy clerks of the Crown in each county acted as marshals and clerks of assize and were paid by the Province an allowance of \$4 *per diem*.⁴⁶

(7) In the County Courts the Province was empowered to appoint a clerk for each county court. The Act is silent as to their mode of remuneration.⁴⁷

(8) In the General Sessions of the Peace, the clerk of the peace was required to be a barrister and solicitor⁴⁸ and was paid by fees.⁴⁹

(9) In the County Courts, the Province appointed a shorthand reporter for each county. But his salary was fixed and paid by the county. He was also permitted to retain any fees to which he might become entitled. These were deducted from his salary.⁵⁰

⁴²Superior Courts of Law Act, R.S.O. 1877, c. 39, ss. 45, 46.

⁴³Chancery Act, R.S.O. 1877, c. 40, s. 16 (2).

⁴⁴Surrogate Courts Act, R.S.O. 1877, c. 46, ss. 68, 69, 70, 71.

⁴⁵Division Courts Act, R.S.O. 1877, c. 47, s. 47.

⁴⁶Courts of Assize and Nisi Prius and of Oyer and Terminer and General Gaol Delivery Act, R.S.O. 1877, c. 41, ss. 13, 16, 17.

⁴⁷County Courts Act, R.S.O. 1877, c. 43, s. 4.

⁴⁸General Sessions Act, R.S.O. 1877, c. 44, s. 11.

⁴⁹Fees of Counsel and Other Officers in the Administration of Justice Act, R.S.O. 1877, c. 84, s. 2.

⁵⁰Local Courts Act, R.S.O. 1877, c. 42, s. 23.

(10) One or more justices of the peace were appointed for each county by the Lieutenant Governor.⁵¹ Both justices of the peace and their clerks were paid by fees. They were not entitled to claim fees for services rendered "connected with cases above the degree of misdemeanour".

(11) Crown attorneys were paid by fees, which in cases of misdemeanours were assessable in costs against the accused upon his conviction.⁵²

The procedure for payment of jurors remained the same as in 1859⁵³ and the special fee fund for this purpose was continued.⁵⁴ The *per diem* allowance for petit jurors had been increased to \$1.50. Provisions were made for the payment of crown witnesses testifying in any case involving a prosecution for treason or a felony.⁵⁵ As legislation previously existed providing for the payment of witnesses in cases of misdemeanours, this legislation served to fill the gap that existed in cases of felonies. The municipality in which the case was tried was required to pay the witness fees but it was entitled to recover one-third of the amount from the Consolidated Revenue Fund of the Province. In the event that the municipality recovered any portion of the witness fees from the prosecutor or the accused, it was then required to remit one-third thereof to the Province.

Three pieces of legislation tied together all of the provisions concerning the payment of the costs of the administration of both civil and criminal justice as they existed in 1877.

The first was a most comprehensive statute, An Act Respecting the Fees of Counsel and Other Officers in the Administration of Justice.⁵⁶ It established a series of tariffs of fees applying to the administration of both civil and criminal justice. The judges of the Superior Courts of Law were required to prepare a tariff of fees to be allowed to any counsel, attorney, or other similar officer with respect to proceedings

⁵¹Justices of the Peace Qualification Act, R.S.O. 1877, c. 71.

⁵²Local Crown Attorneys Act, R.S.O. 1877, c. 78.

⁵³Jurors and Juries Act, C.S.U.C. 1859, c. 31.

⁵⁴Jurors Act, R.S.O. 1877, c. 48.

⁵⁵Crown Witnesses Act, R.S.O. 1877, c. 87.

⁵⁶R.S.O. 1877, c. 84.

in criminal and exchequer cases.⁵⁷ Fees "to be taken by Sheriffs, Coroners, Clerks of the Peace, Constables and Criers" with regard to any services rendered by them in all criminal cases were provided for. A schedule to the Act lists the services normally performed by the respective officers, with the prescribed fee fixed for each service.⁵⁸ This schedule was not exclusive and did not deprive the officers of any fees allocated to them by any other statute for services not set out in the schedule.⁵⁹

The second statute, An Act Respecting the Expenditure of County Funds in Certain Cases,⁶⁰ made each county primarily liable for the payment of the costs of the administration of criminal justice therein, but the individual litigant was rendered liable for the payment of the costs of various procedural steps involved in bringing a matter before the courts. The Act provided:

"1. All fees payable under c. 84 of [the R.S.O.] to the officers therein mentioned, on services in the nature of a *civil remedy*, for individuals at whose instance and for whose private benefit the same are performed, shall be paid by such individuals, and except as herein or otherwise provided by law, all other fees payable to said officers for services connected with the Administration of Justice or County purposes, shall be paid, in the *first instance*, out of County funds; and the Counties paying such fees shall be entitled to be reimbursed, out of the Consolidated Revenue Fund, the amount of such said fees as are payable out of the said Fund under the provisions of *The Act respecting the Expenses of the Administration of Justice in Criminal Matters*."⁶¹

The costs of the prosecution of those charged with felonies, when not otherwise provided for by law, were paid out of county funds.⁶² Similarly, the county was required to pay the costs of the prosecution of misdemeanours in any court of general sessions where the accused was acquitted; where the accused was convicted, he was required to pay such

⁵⁷*Ibid.*, s. 1.

⁵⁸*Ibid.*, s. 2.

⁵⁹*Ibid.*, s. 5.

⁶⁰R.S.O. 1877, c. 85.

⁶¹*Ibid.*, s. 1. Italics added. See also An Act Respecting the Expenses of the Administration of Justice in Criminal Matters, R.S.O. 1877, c. 86.

⁶²R.S.O. 1877, c. 85, s. 2.

costs.⁶³ Each county was required to establish a board of audit to assume the tasks formerly carried out by the justices of the peace at Quarter Sessions, and the treasurer of the county was empowered to disperse county funds in the following order:

- (1) Fees payable to the sheriff, coroner, gaoler and gaol surgeon, and all costs of the maintenance of the prisoners in the county gaol, together with all costs of the repair and maintenance of the court house and gaol.
- (2) The accounts of public officers and officers of the Court of General Sessions.
- (3) All sums payable for any other purpose whatever connected with the administration of justice within the county.
- (4) All other sums allowed by the audit board in the order in which the same were allowed.

The first statute established a tariff of fees; the second statute made the county primarily liable for the payment of a large proportion thereof; and a third statute, *An Act Respecting the Expenses of the Administration of Justice in Criminal Matters*,⁶⁴ required the Province to reimburse the county for its expenses involved in the administration of criminal justice. The Act stated:

“1. Such of the expenses of the Administration of Criminal Justice in this Province as are mentioned in the Schedule to this Act shall be paid out of the Consolidated Revenue Fund of the Province.”⁶⁵

The schedule to the Act contains the items and fees listed in the schedules appended to the statute dealing with fees, which we have just discussed, with the exception of those items which an individual litigant was required to pay, such as the costs of issuing and serving a subpoena and issuing and serving a summons in a private prosecution. The schedule also contains the following general items which were established as provincial expenditures:

- (1) The maintenance of prisoners confined upon criminal charges.

⁶³*Ibid.*, s. 4.

⁶⁴R.S.O. 1877, c. 86.

⁶⁵*Ibid.*, s. 1.

- (2) A proportion of the salary of the gaoler of each county.
- (3) Medicines, fuels and other similar necessities for the gaols.
- (4) Costs of transporting prisoners to the penitentiary or reformatory and costs of carrying other sentences of the court into effect.
- (5) Fees to the gaol surgeons.
- (6) "Together with all other charges relating to criminal justice payable to the foregoing officers especially authorized by any acts of the Legislature and immediately before the 9th of June, 1846 payable out of county funds".

The three statutes of 1877 are important because they established the pattern of provincial financial assistance to local municipalities in their administration of criminal justice, which continued to exist with minor changes until 1957, and which to some extent exists today. The 1877 statutes were maintained in the statutory revisions of 1887⁶⁶ and 1897.⁶⁷ In 1910 they were combined into a single Act, The Administration of Justice Expenses Act.⁶⁸ The Act of 1910 provided, as previously, that the counties were, in the first instance, required to pay the costs set out in schedule "A" and were to be reimbursed by the province for the amounts set out in schedule "C".⁶⁹ This principle was carried forward, with certain amendments, as the Act underwent various revisions,⁷⁰ until 1957, when the Province was relieved of its prior obligation to reimburse the counties for the various services set forth in the schedules.⁷¹

However, as of 1957, the Province was not wholly relieved of its obligation to assist the local municipalities in financing the costs of the administration of justice. In 1937 the Province passed the Municipal Subsidy Act,⁷² pursuant to which the Province was required to pay, according to a stated formula,

⁶⁶R.S.O. 1887, cc. 83, 84, 86.

⁶⁷R.S.O. 1897, cc. 101, 102, 104.

⁶⁸Ont. 1910, c. 41.

⁶⁹*Ibid.*, ss. 14, 41.

⁷⁰Administration of Justice Expenses Act, R.S.O. 1914, c. 96; R.S.O. 1927, c. 126; R.S.O. 1937, c. 141; R.S.O. 1960, c. 5.

⁷¹Ont. 1957, c. 1, s. 2.

⁷²R.S.O. 1937, c. 273.

an annual grant to every city, town, village, and township, to be used "solely for the purpose of reduction of the general municipal tax rate". In 1953 this Act, as amended,⁷³ was repealed and replaced by the Municipal Unconditional Grants Act,⁷⁴ which came into force on January 1, 1954. This Act required the Province to make an annual payment to every municipality, to be used by the municipality "in the provision of welfare services, social services, the administration of justice, and other services". The grant was calculated on a constant of \$1.50 *per capita*, with larger *per capita* payments required according to a sliding-scale of population. The maximum grant applied to municipalities of over 750,000 inhabitants, to which an additional sum of \$2.50 *per capita* was paid.

In 1957 the basis and purpose of payment was amended.⁷⁵ After the first of April, 1958, the Province was required to pay an unconditional grant of \$1.00 *per capita* to every municipality, the "taxpayers of which contribute through municipal taxes toward the cost of the administration of justice in a county". The onus was placed on every municipality to make a local contribution to the cost of the administration of justice if it was to become eligible for the provincial grant. This grant continued in this form through the statutory revision of 1960,⁷⁶ and until 1964,⁷⁷ when the *per capita* grant of \$1.00 for the administration of justice was repealed, and in substitution thereof a lump sum *per capita* payment was provided for. This was stated to be payable: "In recognition of the expenditures that local municipalities are required to make to provide municipal services and in recognition of the larger *per capita* expenditures that municipalities with larger populations are required to make on certain municipal services", and "to be used to reduce the amount of taxes to be levied on residential and farm assessment"—a statement similar to that found in the 1937 legislation.

⁷³Ont. 1939, c. 31.

⁷⁴Ont. 1953, c. 72.

⁷⁵Ont. 1957, c. 80, s. 1.

⁷⁶R.S.O. 1960, c. 259.

⁷⁷Ont. 1964, c. 69, s. 2.

CHAPTER 59

Present Law Concerning Financial Responsibility for the Machinery of Justice

THE Administration of Justice Expenses Act,¹ and the Municipal Unconditional Grants Act,² in the main, delineate the respective responsibilities of the Province and the municipalities for the payment of the costs of the administration of justice. The former Act places a charge upon the local municipalities to pay the costs of the administration of justice in the first instance; the latter Act provides for the payment of annual grants by the Province to the local municipalities, which the municipalities may use for a variety of purposes, including the defrayal of the expenses of the administration of justice. In addition to these general statutes, there is legislation which requires the Province directly to assume certain expenses involved in administering justice, and other legislation which requires the local municipalities to assume the expenses of items not set out in the Administration of Justice Expenses Act. Some repetition of what has been said elsewhere in this Report will be necessary as we examine the relevant statutes defining the present financial responsibility for the administration of justice. This examination will show the extent to which the payment of the costs of the administration of justice is characterized by confusion and needless administrative procedures, resulting in a waste of time and money.

¹R.S.O. 1960, c. 5.

²R.S.O. 1960, c. 259.

THE ADMINISTRATION OF JUSTICE EXPENSES ACT

The Administration of Justice Expenses Act provides schedules of fees which can be "taken by sheriffs, Crown attorneys, clerks of the peace, clerks of courts, local registrars of the Supreme Court, constables, examiners and analysts" for the services set out in the schedules, subject to any rules and regulations with regard thereto made by the Lieutenant Governor in Council.³ The fees allocated to crown attorneys are in relation only to their services in the prosecution of offences under the Criminal Code (Canada). The Act does *not* deprive any of these officers of any fees not contained in the Act, but contained in any Act of the Parliament of Canada or of the provincial Legislature.⁴

The responsibility for the payment of the fees set out in the schedules is twofold. All fees payable "for services and proceedings in the nature of a civil remedy for persons at *whose instance* and for *whose private benefit* the same are performed shall be paid *by such persons*".⁵ All of the other fees set out in the schedules "for services connected with the administration of justice", unless otherwise provided by law, "shall be paid *in the first instance by the county*, unless the county gaol is owned and maintained by a city, in which case the fees in respect of prisoners convicted for offences committed within the city limits shall be paid *in the first instance by the city*, and so far as they relate to prisoners convicted for offences committed in the county without the limits of the city, shall be paid in the first instance by the county".⁶ Thus, it can be seen by examining the schedules that the majority of the expenses set out therein are the responsibility of the local municipalities, and depending upon whether the county gaol is owned and maintained by a city or the county, and depending upon whether the prisoners therein are incarcerated for an offence committed in the city or in the county—a matter involving complicated bookkeeping procedures—the expenses involved are paid either by the city or the county.

³R.S.O. 1960, c. 5, ss. 1, 2, and Schedules A and B.

⁴*Ibid.*, s. 6.

⁵*Ibid.*, s. 17 (1). Italics added.

⁶*Ibid.*, s. 17 (2). Italics added.

In addition to these items, the Act relegates other expenditures to the *county* in respect of the administration of justice:

- (1) The fees of an interpreter employed by the crown attorney in any criminal cause or investigation or at a coroner's inquest.⁷
- (2) The costs of the trial of any person charged with an indictable offence,⁸ and any other proceedings relating thereto.⁹
- (3) In cases of prosecutions for indictable offences where the venue is changed from one county to either a second county or a provisional judicial district, the county where the trial would ordinarily have taken place is required to assume any of the costs incurred by the second county or the provisional judicial district as a result of the changed venue.¹⁰

On the other hand, the Act earmarks the following expenses as those payable by the *provincial government*:

- (1) Compensation for loss of time and expenses of any witness for the Crown residing out of Ontario.¹¹
- (2) Those expenses involved when the venue of a trial of a person charged with an indictable offence has been changed from a provisional judicial district to a county.¹²

The Act provides for the establishment of a Board of Audit for each county to audit and approve "all accounts and demands preferred against a county in respect of the administration of criminal justice".¹³ As soon as all costs involved in the collection of taxes have been paid, the treasurer of the county is required to "pay the amount of the fees that are certified as payable by the county" in the following order:

- (1) All sums payable to the coroner, gaoler, surgeon of the county gaol, or to any other officer or person for the sup-

⁷*Ibid.*, s. 13.

⁸*Ibid.*, s. 19.

⁹*Ibid.*, s. 21.

¹⁰*Ibid.*, s. 20 (1) (2)

¹¹*Ibid.*, s. 11.

¹²*Ibid.*, s. 20 (2).

¹³*Ibid.*, s. 22.

port, care or safekeeping of the prisoners in the county gaol, or for the repair and maintenance of the court house or gaol.

(2) The accounts of public officers and officers of the Court of General Sessions of the Peace.

(3) All sums payable for any other purpose connected with the administration of justice in the county.

(4) All other sums certified as aforesaid in the order in which they are certified.¹⁴

The fact that section 17 (2) states that the expenses set out in the schedules to the Act are payable "*in the first instance*" by the county or city leads directly to the question of whether anyone is required to pay the expenses "*in the second instance*". As discussed previously,¹⁵ prior to 1957, legislation dealing with this subject contained provisions requiring the Province to reimburse the counties for certain expenses which they were required to pay "*in the first instance*" for the administration of criminal justice. Clearly, before 1957 the Province was required to pay the expenses "*in the second instance*". At present no such clear provincial obligation exists, unless it is to be found in the Municipal Unconditional Grants Act.¹⁶ As we have stated, when the Act was first passed in 1953, it provided for a comprehensive *per capita* grant to be used by the municipality "*in the provision of welfare services, social services, the administration of justice, and other services*".¹⁷

Between 1957 and 1964,¹⁸ however, the grant was divided into two parts: a *per capita* grant of \$1.00 was designated to be used by the municipality to defray its expenses in the administration of justice and was payable only to the municipalities, "the taxpayers of which [contributed] through municipal taxes toward the cost of the administration of justice in a county"; and a *per capita* grant of \$2.00 was designated for municipal use in the provision of welfare and social

¹⁴*Ibid.*, s. 27.

¹⁵See pp. 890-91 *supra*.

¹⁶R.S.O. 1960, c. 259.

¹⁷Ont. 1953, c. 72. Italics added.

¹⁸Ont. 1957, c. 80; Ont. 1964, c. 69.

services. Since 1964 a single comprehensive grant of \$3.50 *per capita* is to be paid, which amount, based on an escalating scale regulated by population, can reach \$7.00 *per capita* in the case of a metropolitan municipality or city having a population of 750,000 people or more. The purpose of the present grant is stated in the following language:

"In recognition of the expenditures that local municipalities are required to make to provide municipal services and in recognition of the larger *per capita* expenditures that municipalities with larger populations are required to make on certain municipal services, the following unconditional *per capita* grants, to be used to reduce the amount of taxes to be levied on residential and farm assessment, as required under section 294 of *The Municipal Act*" ¹⁹

In addition to the said *per capita* grant, the Province is also required to make an unconditional grant to the municipalities to assist in defraying the expenses which they are obliged to incur with regard to indigent persons.²⁰ It would therefore appear that while the Province is required to make an annual unconditional grant to every municipality, the municipality is not necessarily required to allocate any or all of the grant to the payment of the costs of the administration of justice. There is an exception, however, with regard to counties containing Indian reserves, in view of the unconditional grant of \$1.00 *per capita* for every Indian living on a reserve in the county, "to assist each such county in the administration of justice" therein.²¹

The broad general plan of financing the administration of justice has been discussed and we now examine the problem more closely. Under relevant statutes, the responsibility for the cost of the administration of justice falls in some areas on the municipalities and in some areas on the Province.

The responsibility is met in several ways:

1. The Province pays some salaries.
2. The municipalities pay some salaries.
3. The Province makes certain grants.

¹⁹Municipal Unconditional Grants Act, R.S.O. 1960, c. 259, preamble to Schedule, as amended by Ont. 1967, c. 57, s. 1.

²⁰*Ibid.*, s. 8a, as enacted by Ont. 1960-61, c. 60, s. 1.

²¹*Ibid.*, s. 8.

4. Some costs and fees are collected from convicted persons.
5. Fees are levied on litigants.
6. The application of fines levied on convicted persons.

THE OBLIGATIONS OF THE LOCAL MUNICIPALITIES

The Coroners Act²²

This Act provides that the Lieutenant Governor in Council may appoint a coroner, known as the Chief Coroner, for every municipality having a population of more than 100,000 persons, and that the municipality is required to pay the salary of the Chief Coroner as fixed by the Lieutenant Governor in Council.²³ The municipality must provide at its own expense such supplies as may be required by the coroners, and a suitable place for the holding of post-mortem examinations and inquests.²⁴ The county or city in which an inquest is held is required to pay the fees set out in the Act to the coroner, crown attorney, constables, jurors, witnesses, court reporter, and interpreter in respect of inquests, and the fees of medical practitioners in respect of post-mortem examinations,²⁵ except that where it is found at an inquest that the death did not arise in the city or county where the inquest was conducted, in which case the fees are to be paid by the city or county where the death occurred.²⁶

The County Judges Act²⁷

While the Lieutenant Governor in Council is required to appoint and fix the salaries of court reporters for the county and district courts, the local municipalities are required to pay the salaries, with the proviso that the court reporters are entitled to retain any fees which they are paid for transcripts of evidence, unless they are expressly prohibited from doing so by the terms of their appointment. If the latter is the case, the reporters must turn over the fees

²²R.S.O. 1960, c. 69.

²³*Ibid.*, s. 3.

²⁴*Ibid.*, s. 36.

²⁵*Ibid.*, s. 37, as amended by Ont. 1965, c. 20, s. 13; and s. 38.

²⁶*Ibid.*, s. 40.

²⁷R.S.O. 1960, c. 77.

to the county treasury.²⁸ The Lieutenant Governor in Council is also empowered to appoint official interpreters for the county or district courts, whose salary is paid by the county or district concerned.²⁹

The Crown Attorneys Act³⁰

The local municipalities are *prima facie* responsible for paying the fees to which crown attorneys are entitled for the prosecution of charges arising therein. The fees are regulated by several tariffs, depending upon the nature of the offence, and, indeed, both the nature of the offence and the area where it has been committed and the trial held will determine whether the fees are payable by a city, a county or by a governmental agency. In any event, however, unless the local municipality or county and the crown attorney have entered into an agreement fixing an annual sum to be paid by the local municipality or county in lieu of fees,³¹ the crown attorney must bill the local municipality or county for his fees based on the relevant tariff, and then remit the sums thus collected to the Treasurer of Ontario quarter-yearly.³² Thus, the general proposition is that the municipality pays the crown attorney, who in turn, after deducting expenses, remits the balance to the Province.³³

Except in those cases where crown attorneys are still paid on a fee basis, the Province pays the crown attorney a salary. The local municipalities are required to pay the fees to the crown attorneys in the following circumstances:

- (1) For services rendered in the prosecution of indictable offences and in connection with the conduct of inquests, the schedule of fees set out in the Administration of Justice Expenses Act is applicable;³⁴

²⁸*Ibid.*, s. 13, as amended by Ont. 1961-62, c. 25, s. 8. For the tariff of fees allowed shorthand reporters in the county courts, see: R.R.O. 1960, Reg. 66, as amended by O. Reg. 221/66, s. 6.

²⁹*Ibid.*, s. 14.

³⁰R.S.O. 1960, c. 82.

³¹*Ibid.*, ss. 8, 9.

³²*Ibid.*, s. 16.

³³Annual Report of the Inspector of Legal Offices, Province of Ontario (1965).

³⁴R.S.O. 1960, c. 5, ss. 17, 19, and Schedule A; see also Coroners Act, R.S.O. 1960, c. 69, s. 38 (2).

(2) For services rendered in the prosecution of an offence against any provincial Act, summary conviction offences, and offences against the Juvenile Delinquents Act, if the municipality is entitled to any fine, or part thereof that could be imposed, the fees set out in the regulations enacted pursuant to the Crown Attorneys Act apply;³⁵

(3) For prosecutions of offences committed against the Liquor Control Act,³⁶ the schedule of fees is set out in the regulations passed pursuant to the Crown Attorneys Act;³⁷

(4) For services rendered in connection with his duties performed under the Crown Witnesses Act,³⁸ the crown attorney is entitled to receive from the county in which the court is held a fee of \$1.00 in respect of every trial on which a witness attends, which fee is over and above his other costs and charges.

It is apparent from this summary that where the crown attorney has not entered into an agreement with the local municipality for an annual sum in lieu of fees, or where the crown attorney receives his salary on the fee basis, a considerable amount of secretarial and bookkeeping work is required. The various cases must be classified. An account must be submitted to the local municipality. The account must be paid to the crown attorney. The sums received from the municipality, together with a proper account, must be remitted to the Provincial Treasurer. A summary must be sent to the Inspector of Legal Offices.

The Crown Witnesses Act³⁹

This Act provides for the payment of witnesses subpoenaed at the instance of the Crown to testify at the sittings of the Supreme Court of Ontario, a Court of General Sessions of the Peace, a County or District Court Judges' Criminal Court, a magistrate's court for the summary trial of indictable offences under the Criminal Code, a preliminary inquiry and proceedings before a grand jury.

³⁵R.R.O. 1960, Reg. 68, ss. 1, 2, 4.

³⁶R.S.O. 1960, c. 217, s. 118.

³⁷R.R.O. 1960, Reg. 68, s. 2.

³⁸R.S.O. 1960, c. 84, s. 10.

³⁹R.S.O. 1960, c. 84.

Witness fees are payable on the order of the crown attorney as he deems proper, not exceeding the amount set out in the schedule to the Act. The fees established are: \$15 for expert witnesses and \$6 a day for all other witnesses, in addition to travelling expenses. These fees are subject to increase on the order of the Attorney General so that the witness will be reasonably compensated for his attendance at the trial. Witness fees are paid from the treasury of the county in which the offence was committed or was alleged to have been committed, or from the treasury of a city or separated town if the offence was committed therein. Any crown witness who testifies at a trial held in a provisional judicial district is paid his fees by the Province.

The Division Courts Act⁴⁰

We dealt fully with division courts and their administration in Chapter 42.

The Jurors Act⁴¹

The local municipalities are required to pay the fees of every grand juror attending a sittings of the Supreme Court or of the Court of General Sessions of the Peace, and of every petit juror attending a sittings of the Supreme Court or of the Court of General Sessions of the Peace, or of the county court. The fees to be paid are \$10 per day, plus travelling expenses of 10¢ per mile and reasonable living expenses up to \$8 per night.⁴²

Upon entering an action for trial by jury in the Supreme Court and in the county court, the party doing so must pay a fee of \$3 and \$1.50 respectively. Subject to any agreement made between the corporation of the county and the corporation of the county town, these fees "shall be . . . paid over to the treasurer of the county and shall form part of the fund for the payment of petit jurors".⁴³ If these funds prove insufficient to pay the jury fees, the county is required to find the necessary revenue from other sources.⁴⁴ Presumably the

⁴⁰R.S.O. 1960, c. 110.

⁴¹R.S.O. 1960, c. 199.

⁴²*Ibid.*, s. 83.

⁴³*Ibid.*, s. 88(2).

⁴⁴*Ibid.*, s. 90.

fund is to be used for the payment of jurors in both civil and criminal cases. As for the districts, the fees of \$3 and \$1.50, paid upon the setting down of actions, are to "be paid over to the treasurer of the district and shall form part of the Consolidated Revenue Fund".⁴⁵ The subject of jurors' fees is dealt with more fully in Chapter 56.

The Justices of the Peace Act⁴⁶

The Lieutenant Governor in Council may assign any justice of the peace to a city and fix his salary, which shall be paid by the city.⁴⁷ The remainder of the justices of the peace in the Province are remunerated on a fee basis or in conjunction with some other office held by them.⁴⁸ A tariff of fees to be paid to justices of the peace for functions performed by them under the Criminal Code is fixed by the Code.⁴⁹ This tariff is made applicable to provincial offences by the Summary Convictions Act.⁵⁰

The Juvenile and Family Courts Act⁵¹

In Chapter 40 we have dealt with the general subject of juvenile and family courts. In the present context we are concerned only with the financial responsibility for their maintenance.

The Act provides that the Province may establish a juvenile and family court in and for a county, two or more counties, a local municipality separated from the county for municipal purposes, two or more local municipalities separated from the county for municipal purposes, and one or more provisional judicial districts.⁵² The primary jurisdiction of the court relates to juvenile offenders and all domestic disputes, where the court has been given jurisdiction by appropriate legislation. The Province is authorized to appoint the judges, which judges are *ex officio* magistrates in and for

⁴⁵*Ibid.*, s. 88(2).

⁴⁶R.S.O. 1960, c. 200.

⁴⁷*Ibid.*, s. 10.

⁴⁸*Ibid.*, ss. 9, 10. See Chapter 38 *supra*.

⁴⁹Crim. Code, s. 744.

⁵⁰R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1.

⁵¹R.S.O. 1960, c. 201.

⁵²*Ibid.*, s. 1.

the province of Ontario, and to fix their salaries.⁵³ Every municipality having a juvenile and family court is required to provide and maintain, at its own expense, a detention home to house those juveniles charged with offences.⁵⁴

The Province has the authority to appoint and fix the salaries of those officers required to administer the juvenile and family courts, such as a superintendent and assistant superintendent of the detention home,⁵⁵ such professional persons as are necessary to properly run a diagnostic clinic,⁵⁶ an executive officer for the court in any municipality having a population of more than 500,000 people,⁵⁷ a court clerk,⁵⁸ probation officers,⁵⁹ and court reporters.⁶⁰

The local municipality must provide at its own expense suitable court facilities for the juvenile and family court and all necessary court offices, together with all supplies and equipment for the court and court offices, and pay the salaries of the judges, court officers, secretaries and clerks. However, where a juvenile and family court judge sits as a magistrate in a magistrate's court, his salary shall be paid by the Province, but the municipality which would, but for this provision, be responsible for paying his salary is required to reimburse the Province.⁶¹ Should the Province elect to do so, it may pay to any municipality a grant to be applied towards the cost of maintaining the juvenile and family court.⁶²

The Magistrates Act⁶³

The Magistrates Act vividly illustrates the confused mosaic of the financial responsibility for the machinery of justice in this Province, to which we alluded at the opening

⁵³*Ibid.*, s. 4, as amended by Ont. 1964, c. 51, s. 1; s. 5a as enacted by Ont. 1960-61, c. 42, s. 3, as amended by Ont. 1964, c. 51, s. 3.

⁵⁴*Ibid.*, ss. 6, 7.

⁵⁵*Ibid.*, s. 6(2).

⁵⁶*Ibid.*, s. 8. Such a clinic may be established, maintained and operated as part of the juvenile and family court of any municipality having a population of more than 500,000 persons.

⁵⁷*Ibid.*, s. 9.

⁵⁸*Ibid.*, s. 10.

⁵⁹*Ibid.*, s. 11.

⁶⁰*Ibid.*, s. 12.

⁶¹*Ibid.*, s. 16(2), as amended by Ont. 1964, c. 51, s. 6(2).

⁶²*Ibid.*, s. 19.

⁶³R.S.O. 1960, c. 226.

of this Section. Magistrates are appointed and their salaries fixed by the Lieutenant Governor in Council.⁶⁴ Their salaries and travelling expenses are payable out of sums appropriated by the Legislature.⁶⁵

The magistrate may use any courtroom or municipal hall, so long as this does not interfere with its ordinary use.⁶⁶ The Inspector of Legal Offices may direct what courtroom, office furniture, equipment and stationery shall be supplied to the magistrates, and authorize a magistrate to employ clerical assistance and fix the salary.⁶⁷

The Province may assign certain magistrates to a city and this has been done in the case of Metropolitan Toronto, Ottawa, Hamilton, London and Windsor. Where a magistrate is assigned to a city, the magistrate pays over the fees of his office to the treasurer of that city, but in other cases the fees of the office are paid over to the Treasurer of Ontario. Except in the cases of the five cities, every magistrate is required each month, "from the total amount of the moneys coming into his hands that would *otherwise accrue to the treasurer of a municipality*" (i.e., the fines that would be payable to the municipality), to deduct and pay all the expenses of his court, to pay two-fifths of the balance to the Province, and remit the other three-fifths to the municipality or the municipalities in accordance with the portion of the fines collected which would ordinarily accrue to the municipality.⁶⁸

In the event that the magistrate has insufficient fines on hand to pay his monthly expenses, he is entitled to make up the deficiency from any moneys in his hands that would otherwise be payable to the Treasurer of Ontario. It follows that the municipality is required to pay out of the fines, to which by law it is entitled, all the expenses of the magistrate's court except the magistrate's salary, which is paid by the Province, and then two-fifths of the balance is paid to the Province.

In cases where the magistrate is assigned to a city, no portion of the moneys coming into his hands is remitted to the

⁶⁴*Ibid.*, s. 2, as amended by Ont. 1964, c. 57, s. 2; and s. 12 (1).

⁶⁵*Ibid.*, s. 12 (2).

⁶⁶*Ibid.*, s. 13.

⁶⁷*Ibid.*, ss. 14, 15.

⁶⁸*Ibid.*, s. 18 (1). Italics added.

Treasurer of the Province. The city remits to the Province the amount of the salary and allowances paid to the magistrate by the Province, and provides the court facilities as well as all other expenses arising out of the magistrate's court.⁶⁹

The duties imposed on a magistrate in making monthly reports and returns are heavy, extensive and very complicated.⁷⁰ In compiling his monthly report to the Inspector of Legal Offices, he is required to list for each day every case heard by him, stating the nature of the offence, the municipality in which it was committed and the penalty; the fine paid, and whether the fine is allocated to the Province, the municipality or the federal government; the fees paid; unpaid fines and fees; and any remarks. Specimen sheets from the monthly reports and returns of one of the magistrates—Appendix B and Appendix C^{70a} to this chapter—vividly demonstrate the imposition on the time of a magistrate required under the system of allocating fines, costs, etc., to various municipalities and persons.

The Municipal Act^{70b}

For judicial purposes, every county or district, and all of the cities, towns, villages, townships, geographic townships, and improvement districts situate therein, are regarded as a single entity; however, a city, town or village has the power to withdraw from a county or district for the purpose of establishing its own autonomous local government, in which case it is known as a separated city, town or village, as the case may be, separated from the county or district for municipal purposes.⁷¹ Thus, a city, town, or village, although it may be separated from a county administration for municipal purposes, is part of the county administration for judicial purposes.

A broad scheme of the local responsibilities involved in the administration of justice is set out in sections 352 to

⁶⁹*Ibid.*, s. 19(1).

⁷⁰R.R.O. 1960, Reg. 415.

^{70a}See Appendix B and Appendix C following p. 919 *infra*.

^{70b}R.S.O. 1960, c. 249.

⁷¹Territorial Division Act, 1960, c. 395, s. 1, as amended by Ont. 1964, c. 116, s. 1; and s. 5.

376 of the Municipal Act.⁷² In summary, these responsibilities are:

(1) Every city and town must establish and maintain a police force and all necessary equipment required for that purpose.⁷³

(2) Every county must provide and maintain a county court house and a county jail, supply all necessary equipment and supply food and other necessities for the prisoners in the jail.⁷⁴ The court house is to contain adequate accommodation and the necessary equipment for all provincial courts of justice (the use by the division courts is subject to the requirement of other courts), for the library of the County Law Association, and for all offices connected with the provincial courts.⁷⁵ The county is permitted to use the county court house as a county hall and as offices for county officials.⁷⁶ Where a county contains a separated city or town, the county court house and jail becomes the court house and jail for the separated city or town, unless the separated city or town has provided its own court house and/or jail.⁷⁷

(3) Every county or city that provides and maintains a jail is required to appoint a jailer, jail surgeon, and other jail employees and to fix and pay their salaries.⁷⁸

(4) Every local municipality *may* establish and maintain a lock-up house for the detention of persons sentenced to a term of imprisonment of less than ten days, and of persons awaiting trial or awaiting removal to a reformatory or penitentiary.⁷⁹

Where a city or town has been separated from a county or district for municipal purposes, and does not have its own court house and/or jail but uses the county court house and/or jail, such separated city or town is required to reimburse the county for its just share or proportion of the costs

⁷²R.S.O. 1960, c. 249.

⁷³*Ibid.*, ss. 352, 353.

⁷⁴*Ibid.*, s. 355.

⁷⁵*Ibid.*, s. 360(1).

⁷⁶*Ibid.*, s. 356(2).

⁷⁷*Ibid.*, s. 357.

⁷⁸*Ibid.*, s. 385(2), as amended by Ont. 1961-62, c. 86, s. 40.

⁷⁹*Ibid.*, s. 372, as amended by Ont. 1966, c. 93, s. 21.

incurred by the county in constructing and maintaining the court house or jail, and all the other responsibilities incumbent upon the county with regard thereto: in drafting, selecting, enrolling and paying jurors, in providing and maintaining a land registry office, in the use of the court house for sittings of the division court, and in all other charges relating to the administration of justice.⁸⁰ Similarly, a city or separated town which uses the county jail for any purpose including that of a lock-up house, must pay to the county such amount as may be mutually agreed upon or determined by arbitration for the care and maintenance of the prisoners in the jail.⁸¹ A city or separated town is also required to share with the county the costs involved in conveying a prisoner from the county jail or lock-up house to his trial in the city or separated town, and back to the jail or lock-up house, such costs to be shared in the same proportion as the expenses related to the administration of justice under section 363 of the Act.⁸²

A somewhat different situation applies to the Municipality of Metropolitan Toronto.⁸³ The Metropolitan Corporation is required to provide and maintain a court house and jail adequate for the purposes of both Metropolitan Toronto and the County of York, and is required to provide all necessary supplies for the court house, including accommodation for the provincial courts of justice, the library of the York County Law Association, the court officers, and the Crown Attorney for Metropolitan Toronto and the County of York.⁸⁴ The County of York is required to share the costs with the Metropolitan Corporation in the same manner in which separated cities and towns are required to share the costs of the administration of justice with the county in which they are situate for judicial purposes.⁸⁵

The Act also provides that the Metropolitan Corporation shall be deemed to be a city for the purposes of the Juvenile and Family Courts Act, the Coroners Act, the Registry Act, the Land Titles Act, the Magistrates Act, section 151 of the

⁸⁰*Ibid.*, s. 363.

⁸¹*Ibid.*, ss. 369, 374.

⁸²*Ibid.*, ss. 362, 375.

⁸³Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260.

⁸⁴*Ibid.*, s. 173; and s. 177, as amended by Ont. 1961-62, c. 88, s. 12.

⁸⁵*Ibid.*, ss. 179, 180, 182.

Highway Traffic Act, section 87 of the Liquor Licence Act, and section 20 (2) of the Juvenile Delinquents Act.⁸⁶

The difficulty of making an equitable division of shared costs of the administration of justice as between municipalities is clearly demonstrated by the provisions of the Municipal Act concerning compensation for use of the court house and jail, and the maintenance of prisoners.⁸⁷

The Police Act⁸⁸

Every city, town and township in which there is a high density of population and real property assessment, is required, at its own expense, to provide and maintain a police force.⁸⁹ Such policing is accomplished by the board of commissioners of police or the municipal council hiring a sufficient number of police officers, who are remunerated by the local municipality, by one municipality's entering into an agreement with another municipality to be policed by the force of that municipality, or by the municipality's entering into an agreement with the Ontario Provincial Police Force to be policed by that force, in which case the municipality must pay the cost of such policing to the Province.⁹⁰ All of the balance of the Province not policed by local police forces, or by the Ontario Provincial Police pursuant to an agreement under section 53 of the Act, is policed by the Ontario Provincial Police. In addition, the Ontario Provincial Police polices the Queen's highways and, subject to any agreement in force under the Liquor Licence Act, enforces that Act, the Liquor Control Act,⁹¹ and any other laws designated by the Attorney General.⁹²

The Sheriffs Act⁹³

The Lieutenant Governor in Council is empowered to appoint a sheriff for each county and district, and also such

⁸⁶*Ibid.*, ss. 189, 190, 192(9), 192(12), 203, 206, 207; and s. 164a, as enacted by Ont. 1966, c. 96, s. 19, respectively.

⁸⁷R.S.O. 1960, c. 249, s. 369.

⁸⁸R.S.O. 1960, c. 298.

⁸⁹*Ibid.*, s. 2, as amended by Ont. 1965, c. 99, s. 1, and s. 2(2), as amended by Ont. 1964, c. 92, s. 2.

⁹⁰*Ibid.*, s. 52; and s. 53, as amended by Ont. 1964, c. 92, s. 19; and s. 3a, as enacted by Ont. 1964, c. 92, s. 3.

⁹¹R.S.O. 1960, c. 218, s. 87, and c. 217, respectively.

⁹²Police Act, R.S.O. 1960, c. 298, s. 3.

⁹³R.S.O. 1960, c. 371,

persons as may be required to staff the sheriff's office.⁹⁴ The counties are required to remunerate the sheriff in accordance with the tariff of fees set out in Schedule A to the Administration of Justice Expenses Act.⁹⁵ The sheriff and the county for which he is appointed may, however, enter into an agreement for the payment to him by the county of a fixed annual salary in lieu of the fees to which he would be entitled.⁹⁶

The Training Schools Act, 1965⁹⁷

The Act provides for the establishment of training schools in the Province, which schools are to be constructed by the provincial government at its own expense. The schools are to be used to accommodate any children under the age of sixteen sentenced thereto, upon being convicted of an offence by a judge of the Juvenile and Family Court. All evidence taken at such hearings before a judge of the Juvenile and Family Court is to be taken down and transcribed by a stenographic reporter who is to be remunerated by the municipality to which the child belongs.⁹⁸ If the child belongs to a provisional judicial district, however, the fees are payable by the Province. The Act provides that where a child is sent to a training school, the municipality to which the child belongs is liable for the payment to the Province of such fees as are prescribed by the regulations for the maintenance of the child. However, the municipality is given a right over against the parents of the child to recover the fees for which the municipality is responsible under the Act.⁹⁹

THE OBLIGATIONS OF THE PROVINCIAL GOVERNMENT

The Coroners Act¹⁰⁰

The Lieutenant Governor in Council is empowered to appoint a supervising coroner for the Province whose salary is to be paid by the Province.¹⁰¹ The Province is required to

⁹⁴*Ibid.*, s. 1, as amended by Ont. 1965, c. 124, s. 1.

⁹⁵R.S.O. 1960, c. 5.

⁹⁶R.S.O. 1960, c. 371, s. 15.

⁹⁷Ont. 1965, c. 132.

⁹⁸*Ibid.*, s. 8 (3).

⁹⁹*Ibid.*, ss. 16, 18.

¹⁰⁰R.S.O. 1960, c. 69.

¹⁰¹*Ibid.*, s. 2, as amended by Ont. 1960-61, c. 12, s. 2.

reimburse any county for expenses incurred in connection with a coroner's investigation or inquest into any death occurring in an institution to which the Mental Hospitals Act applies, or in a reformatory, industrial farm or training school administered by the Department of Reform Institutions.¹⁰²

The County Courts Act¹⁰³

It is the duty of the Lieutenant Governor in Council to appoint a clerk for each county court and to appoint such persons as may be necessary to the staff of the clerk's office, all of whom are paid by the Province.¹⁰⁴

The County Judges Act¹⁰⁵

The Province is required to pay annual allowances of \$7,000 to the Chief Judge of the County and District Courts, \$4,500 to the judge of the County Court of the County of York, and \$3,500 to the judge or junior judge of every other county or district court, which allowances are "in lieu of all fees and allowances payable to the judge of a county or district court for any services performed by him under any Act of the Legislature, including fees as judge of the surrogate court and as local master of the Supreme Court".¹⁰⁶ These provisions are fully discussed in Chapters 45 and 46.

The Crown Attorneys Act¹⁰⁷

The Act provides that while every crown attorney is entitled to retain the fees of his office, the Lieutenant Governor in Council is entitled to commute the fees and pay the crown attorney a fixed annual salary.¹⁰⁸ In actual practice, eight crown attorneys are presently on the fee basis; the remainder of them are paid a salary by the Province. Every crown attorney on the fee basis is entitled to retain each year the net income derived from his office, up to \$6,000, and is

¹⁰²*Ibid.*, s. 39.

¹⁰³R.S.O. 1960, c. 76.

¹⁰⁴*Ibid.*, s. 3, as amended by Ont. 1965, c. 23, s. 1.

¹⁰⁵R.S.O. 1960, c. 77.

¹⁰⁶*Ibid.*, s. 9, as amended by Ont. 1962-63, c. 28, s. 1. This obligation is now contained in the Surrogate Courts Act, R.S.O. 1960, c. 388, s. 8(4), as enacted by Ont. 1967, c. 97, s. 1.

¹⁰⁷R.S.O. 1960, c. 82.

¹⁰⁸*Ibid.*, s. 7, as amended by Ont. 1962-63, c. 29, s. 2.

required to remit to the Province one-half of the excess over that sum.¹⁰⁹

The Judicature Act¹¹⁰

The Lieutenant Governor in Council is empowered to appoint such stenographic reporters as are necessary for the Supreme Court of Ontario. Stenographic reporters are officers of the Court and are paid an annual salary by the Province.¹¹¹ Stenographic reporters are entitled to take fees for transcripts in addition to their salary.¹¹² The fees to which the stenographic reporters are entitled for producing transcripts of evidence are to be paid by the parties, except in cases where the judge orders copies of evidence for his own use, in which case they "shall be paid [for] by the county upon the certificate of the judge".¹¹³

The Public Officers' Fees Act¹¹⁴

This Act establishes limitations on fees that may be retained by certain officers, such as sheriffs, crown attorneys, clerks of the peace, local registrars of the Supreme Court of Ontario, deputy registrars, clerks of the county or district courts, registrars of the surrogate courts, and division court clerks and bailiffs, who are paid by fees and not by salaries.¹¹⁵ The Act provides that the Province may pay to the sheriff and other officers of any of the eleven provisional judicial districts in the Province¹¹⁶ "such several sums of money by way of salary or otherwise and in addition to the fees that are received by such officers as are thought reasonable for the services performed by them".¹¹⁷

The Surrogate Courts Act¹¹⁸

There shall be a surrogate court for every county. The Lieutenant Governor in Council appoints the judges of the

¹⁰⁹Public Officers' Fees Act, R.S.O. 1960, c. 327, s. 5.

¹¹⁰R.S.O. 1960, c. 197.

¹¹¹*Ibid.*, ss. 82, 98.

¹¹²*Ibid.*, s. 86.

¹¹³O. Reg. 220/66, ss. 6, 7. See Chapter 52 *supra*.

¹¹⁴R.S.O. 1960, c. 327.

¹¹⁵*Ibid.*, ss. 4, 5, 6; s. 7, as amended by Ont. 1962-63, c. 116, s. 1.

¹¹⁶Territorial Division Act, R.S.O. 1960, c. 395, s. 1, as amended by Ont. 1964, c. 116, s. 1.

¹¹⁷R.S.O. 1960, c. 327, s. 9.

¹¹⁸R.S.O. 1960, c. 388.

surrogate courts, and where the surrogate court judge is not a judge of the county court, his salary is paid by the Province. While the Lieutenant Governor in Council may appoint any person as a surrogate court judge, in actual fact all judges of the surrogate court are county or district court judges.¹¹⁹ The sittings of the surrogate court are held in the county court house. The Lieutenant Governor in Council may appoint a registrar for each surrogate court.¹²⁰

The Act and regulations passed pursuant thereto provide a tariff of fees payable by the public upon applications for letters probate, letters of administration, and letters of guardianship, which fees the Lieutenant Governor in Council "may apportion . . . between the judge and the registrar".¹²¹ These fees are paid over to the Province.

FUNDS RECEIVED BY THE MUNICIPALITIES IN RELATION TO THE ADMINISTRATION OF JUSTICE

The Highway Traffic Act¹²²

The Act provides that fines collected for offences committed under the Act are to be paid over to the following bodies:

- (1) To a city or town, where the offence was committed in the city or town, except on a controlled-access highway;
- (2) To a village or township for any offence committed on a highway therein, except on the Queen's Highway, unless, in the latter instance, the council of the village or township has entered into an agreement with the Minister of Transport to provide for the payment to the village or township of all fines recovered as a result of offences occurring on a Queen's highway, (except a controlled-access highway), where the information or complaint was laid by a constable of the village or township; and
- (3) In all other cases, to the Department of Transport.¹²³

¹¹⁹*Ibid.*, ss. 2, 8.

¹²⁰*Ibid.*, s. 12, as amended by Ont. 1965, c. 129, s. 2.

¹²¹*Ibid.*, s. 74; R.R.O. 1960, Reg. 551, s. 89, and Appendix B.

¹²²R.S.O. 1960, c. 172.

¹²³*Ibid.*, s. 151.

The Jails Act¹²⁴

The Province shall pay annually by way of grant to each county and city which maintains a jail, a sum of money equal to ten per cent of the annual net cost of maintaining the jail.¹²⁵ In addition to these funds, the municipality has a further potential source of revenue. The Act provides for employment of prisoners beyond the limits of the common jail in certain projects authorized by the Lieutenant Governor in Council. Any moneys earned by the prisoners are to be divided between the Province and the county in proportion to the amount contributed to them respectively towards the care and maintenance of the prisoners.¹²⁶

The Municipal Act¹²⁷

A municipal council and board of commissioners of police may pass by-laws imposing fines of not more than \$300 for the contravention of any by-law passed by the council or board, pursuant to the authority vested in them for that purpose under the Municipal Act. Where a prosecution for an offence committed contrary to any municipal by-law is brought by a peace officer or an employee of the municipal corporation, the entire fine collected as a result is payable to the corporation, and in all other cases one-half of the fine belongs to the corporation and the other half to the prosecutor.¹²⁸

The Police Act¹²⁹

The provincial government is permitted to make an annual grant to every municipality having a local police force, provided that: (1) all the members of the force are covered by the Workmen's Compensation Act or a benefit plan approved by the Workmen's Compensation Board, (2) that the municipality is not in default under the terms of any collective bargaining agreement touching the members of the police

¹²⁴R.S.O. 1960, c. 195.

¹²⁵*Ibid.*, s. 8a, as enacted by Ont. 1961-62, c. 64, s. 1. For the formula used in calculating the amount of the grant, see O. Reg. 63/63.

¹²⁶R.S.O. 1960, c. 195, ss. 14, 15.

¹²⁷R.S.O. 1960, c. 249.

¹²⁸*Ibid.*, s. 482, as amended by Ont. 1961-62, c. 86, s. 55; and s. 483.

¹²⁹R.S.O. 1960, c. 298.

force, (3) that a pension plan is established for the members of the force to which the municipality is not in default under the terms of any collective bargaining agreement touching the members of the police force, and (4) that a pension plan is established for the members of the force to which the municipality contributes not less than five per cent of the amount of the salaries of the police officers participating in the plan.¹³⁰ The amount of the provincial grant is equal to a certain proportion of the total amounts paid by the municipality for the preceding year in respect of the Workmen's Compensation Act or a benefit plan approved by the Workmen's Compensation Board, and in respect of contributions to a pension plan for the members. For example, where the population of the municipality is less than 10,000, the grant is twenty-five per cent of such amounts; where it is more than 25,000, the grant is ten per cent.

FINES IMPOSED FOR BREACHES OF PROVINCIAL LAWS

As we said when discussing the early history of the financial responsibility for the administration of justice in the Province, a practice developed early in the 19th century whereby the fines were divided in many cases between the informer and the municipality in which the offence occurred, while in other cases the entire fines were paid to the municipality in which the offence occurred.¹³¹ There are still many statutes in force which provide that fines recovered as a result of a prosecution for a provincial offence are to be divided between the informer and either the Province, a local municipality or some other body, or are to be paid in full either to the local municipality in which the offence occurred, or to some other body.

A representative list of statutes providing for fines to be paid to, or shared by, others than the Province is set out in Appendix A to this chapter.^{131a}

The sharing of fines with informers or prosecutors and the payment of fines to boards, tribunals or other bodies for

¹³⁰*Ibid.*, s. 37, as amended by Ont. 1961-62, c. 105, s. 5, and s. 38, as amended by Ont. 1966, c. 118, s. 10.

¹³¹See pp. 870-71 *supra*.

^{131a}See pp. 915 ff. *infra*.

their own purposes is wrong in principle. No person or body other than the State which represents the entire population should have a pecuniary interest in securing a conviction. Laws exist for the protection of the State and its members and all penalties recovered for breaking the law should be paid to the State. Some contend that what we have said should not apply to municipalities. We think it should. Where municipalities share in fines too often the members of the public are led to think that the object of the prosecution is not law enforcement but the collection of revenue. This brings the law into contempt.

We, therefore, recommend that all fines imposed as penalties for the contravention of all laws passed under the authority of the Provincial Legislature should be paid in full to the Province, and that no person acting as informer, prosecutor, or in any other capacity should be entitled to any share of the portion of the penalty levied.

FINES IMPOSED FOR BREACHES OF FEDERAL LAWS

Generally, fines imposed for breaches of federal laws and for forfeiture of recognizances go to the Province in which the fines were imposed or the recognizance forfeited.

There are these exceptions:

1. Where a fine, penalty or forfeiture is imposed in respect of a violation of a revenue law of Canada, or in respect of malfeasance in office of an officer or employee of the Government of Canada, or in any proceedings instituted at the instance of the Government of Canada in which that Government bears the costs of the prosecution, the proceeds of the fine, penalty or forfeiture go to the Government of Canada together with the proceeds of any recognizance.
2. Where, in the Province of Ontario, the fine, penalty, forfeiture or recognizance by virtue of section 626 of the Criminal Code belong to the Province, but a municipality bears in whole or in part the expense of administering the law under which they were imposed, the proceeds shall be paid to that municipality.¹³²

¹³²Crim. Code., s. 626 (2) (4).

APPENDIX A

Statutes Which Provide for Fines to be Paid to, or Shared by, Others than the Province

1. The Assessment Act.¹³³ All penalties are to be paid to the municipality in which the offence occurs, unless the Act otherwise provides.¹³⁴
2. The Cemeteries Act.¹³⁵ Where the prosecution is at the instance of a local municipality, the fines are to be paid thereto; where it is at the instance of the Province, the fines are paid to the Province.¹³⁶
3. The Construction Safety Act.¹³⁷ Where the offence was committed in a municipality, the fines are paid thereto; where it is committed in territory without municipal organization, the fines are paid to the Province.¹³⁸
4. The Controverted Elections Act.¹³⁹ All penalties recovered with relation to the offence of corrupt election practices are to be divided equally between the private prosecutor and the Crown.¹⁴⁰
5. The Dentistry Act.¹⁴¹ All penalties are to be paid to the Royal College of Dental Surgeons of Ontario.¹⁴²
6. The Egress from Public Buildings Act.¹⁴³ All penalties are to be divided equally between the informant and the municipality in which the offence was committed.¹⁴⁴
7. The Jurors Act.¹⁴⁵ For all offences created by section 101 a fine of \$200 is imposed "one half of which shall be paid over to the treasurer of the county and shall form part of the fund for the payment of petit jurors, and the other

¹³³R.S.O. 1960, c. 23.¹³⁴*Ibid.*, s. 241.¹³⁵R.S.O. 1960, c. 47.¹³⁶*Ibid.*, s. 82.¹³⁷Ont. 1961-62, c. 18.¹³⁸*Ibid.*, s. 23.¹³⁹R.S.O. 1960, c. 65.¹⁴⁰*Ibid.*, s. 75(19).¹⁴¹R.S.O. 1960, c. 91.¹⁴²*Ibid.*, s. 23(9).¹⁴³R.S.O. 1960, c. 116.¹⁴⁴*Ibid.*, s. 3.¹⁴⁵R.S.O. 1960, c. 199.

half, with full costs, to any person who sues for it in any court of competent jurisdiction".¹⁴⁶

8. The Liquor Control Act.¹⁴⁷ All penalties are payable to the Liquor Control Board of Ontario, unless an agreement has been entered into between the Board and a local municipality pursuant to which part or all of the penalties are payable to the municipality.¹⁴⁸
9. The Liquor Licence Act.¹⁴⁹ All penalties are payable to the Liquor Control Board of Ontario, unless an agreement has been entered into between the Board and a local municipality pursuant to which part or all of the penalties are payable to the municipality.¹⁵⁰
10. The Highway Traffic Act.¹⁵¹ Depending upon where the offence occurred, all penalties are to be paid to a city, town, village, township or the Department of Transport.¹⁵²
11. The Medical Act.¹⁵³ All penalties are to be paid to the College of Physicians and Surgeons of Ontario which may allot part thereof to the payment of the prosecutor.¹⁵⁴
12. The Milk Act.¹⁵⁵ All penalties recovered for the offence of failing to pay the minimum price established by the Act for any regulated product are to be paid to the Milk Commission of Ontario or to a marketing board to reimburse the person who failed to receive the minimum price or to be used for the purposes of the Act.¹⁵⁶
13. The Niagara Parks Act.¹⁵⁷ All penalties recovered for any offence committed contrary to the regulations are to be paid to the Niagara Parks Commission.¹⁵⁸

¹⁴⁶*Ibid.*, s. 101.

¹⁴⁷R.S.O. 1960, c. 217.

¹⁴⁸*Ibid.*, s. 122.

¹⁴⁹R.S.O. 1960, c. 218.

¹⁵⁰*Ibid.*, ss. 66, 87.

¹⁵¹R.S.O. 1960, c. 172.

¹⁵²*Ibid.*, s. 151.

¹⁵³R.S.O. 1960, c. 234.

¹⁵⁴*Ibid.*, s. 61.

¹⁵⁵Ont. 1965, c. 72.

¹⁵⁶*Ibid.*, ss. 20, 22.

¹⁵⁷R.S.O. 1960, c. 262.

¹⁵⁸*Ibid.*, s. 19.

14. The Municipal Act.¹⁵⁹ All penalties recovered for any offence committed pursuant to any by-law passed under the authority of the Act are to be paid to the municipal corporation if the prosecution is brought by a peace officer or a municipal employee; in all other cases, the penalties are to be equally divided between the corporation and the prosecutor.¹⁶⁰
15. The Municipality of Metropolitan Toronto Act.¹⁶¹ All penalties recovered for any offence committed pursuant to any by-law passed under the authority of the Act are to be paid to the Municipality of Metropolitan Toronto if the prosecution is brought by a peace officer or a municipal employee; in all other cases, the penalties are to be equally divided between the Metropolitan corporation and the prosecutor.¹⁶²
16. The Pharmacy Act.¹⁶³ All penalties are to be paid to the Ontario College of Pharmacy.¹⁶⁴
17. The Pounds Act.¹⁶⁵ All penalties are to be divided equally between the private prosecutor and the municipality in which the offence was committed, unless the information is laid "by an officer of the municipality" in which case the entire penalty is to be paid to the municipality.¹⁶⁶
18. The Power Commission Act.¹⁶⁷ All penalties recovered as a result of offences committed pursuant to sections 46 and 97 are to be paid to the Hydro-Electric Power Commission of Ontario.¹⁶⁸
19. The Private Sanitaria Act.¹⁶⁹ All penalties are to be paid to the clerk of the peace for the county or district in which the offence was committed to be used by him for the purposes of the Act, which purposes include a payment

¹⁵⁹R.S.O. 1960, c. 249.

¹⁶⁰*Ibid.*, s. 483.

¹⁶¹R.S.O. 1960, c. 260.

¹⁶²*Ibid.*, s. 215; and s. 225(1), as amended by Ont. 1966, c. 96, s. 36(1).

¹⁶³R.S.O. 1960, c. 295.

¹⁶⁴*Ibid.*, s. 61.

¹⁶⁵R.S.O. 1960, c. 299.

¹⁶⁶*Ibid.*, s. 24.

¹⁶⁷R.S.O. 1960, c. 300.

¹⁶⁸*Ibid.*, ss. 46, 97.

¹⁶⁹R.S.O. 1960, c. 307.

- of an allowance to the clerk of the peace in his capacity as secretary of the board of visitors of a sanitarium.¹⁷⁰
20. The Professional Engineers Act.¹⁷¹ All penalties are to be paid to the Association of Professional Engineers of the Province of Ontario.¹⁷²
 21. The Public Health Act.¹⁷³ Where the prosecution is at the instance of a local municipality, the penalties are to be paid thereto for the use of the local board of health; where it is at the instance of the province, or where the offence was committed in a territory without municipal organization, the penalties are to be paid to the province.¹⁷⁴
 22. The Separate Schools Act.¹⁷⁵ Except where otherwise provided, all penalties are to be applied to such separate school purposes as the Minister of Education may direct.¹⁷⁶
 23. The Statute Labour Act.¹⁷⁷ All penalties are to be paid to the treasurer of the municipality in which the offence was committed and are to form part of the statute labour fund thereof.¹⁷⁸
 24. The Steam Threshing Engines Act.¹⁷⁹ All penalties are to be equally divided between the informer and the municipality in which the offence was tried.¹⁸⁰
 25. The Surveyors Act.¹⁸¹ All penalties are to be paid to the Association of Ontario Land Surveyors.¹⁸²
 26. The Threshing Machines Act.¹⁸³ All penalties are to be equally divided between the "complainant or prosecutor"

¹⁷⁰*Ibid.*, ss. 48, 6(2), 3(2).

¹⁷¹R.S.O. 1960, c. 309.

¹⁷²*Ibid.*, s. 3(4).

¹⁷³R.S.O. 1960, c. 321.

¹⁷⁴*Ibid.*, s. 118.

¹⁷⁵R.S.O. 1960, c. 368.

¹⁷⁶*Ibid.*, s. 73.

¹⁷⁷R.S.O. 1960, c. 382.

¹⁷⁸*Ibid.*, s. 8.

¹⁷⁹R.S.O. 1960, c. 384.

¹⁸⁰*Ibid.*, s. 3.

¹⁸¹R.S.O. 1960, c. 389.

¹⁸²*Ibid.*, s. 38. For further examples of statutes providing for payment of penalties to governing bodies of self-governing professions or occupations, see p. 1206 *infra*.

¹⁸³R.S.O. 1960, c. 397.

and the school section in which the offence was committed for the use of the public school in such section.¹⁸⁴

27. The Trench Excavators' Protection Act.¹⁸⁵ Where an offence is committed in a municipality, all penalties are to be paid thereto; where it is committed in a territory without municipal organization, the penalties are to be paid to the province.¹⁸⁶
28. The Workmen's Compensation Act.¹⁸⁷ All penalties are to be paid to the Workmen's Compensation Board to form part of the accident fund.¹⁸⁸

There are, of course, a great many statutes which contain provisions requiring all penalties recovered pursuant thereto to be paid to the Treasurer of Ontario. These provisions, and those listed above, must be read together with the provisions of the Fines and Forfeitures Act¹⁸⁹ which states that, "except so far as other provision is made in respect thereto . . . every fine imposed for a contravention of any statute in force in Ontario . . . shall . . . be paid to the Treasurer of Ontario . . .".¹⁹⁰ It is further provided that such a fine, if no other provision is made for its recovery, is recoverable with costs by a civil action at the suit of the Crown or of any person suing as well for the Crown as for himself. If the recovery is at the suit of the Crown, the fine belongs to the Crown, and if at the suit of a private party, then it is equally divided between him and the Crown. Where a fine belongs to the Crown, the Lieutenant Governor in Council may allow any part thereof to any person by whose information or aid it was recovered.¹⁹¹

¹⁸⁴*Ibid.*, s. 3.

¹⁸⁵R.S.O. 1960, c. 407.

¹⁸⁶*Ibid.*, s. 25.

¹⁸⁷R.S.O. 1960, c. 437.

¹⁸⁸*Ibid.*, s. 120.

¹⁸⁹R.S.O. 1960, c. 143.

¹⁹⁰*Ibid.*, s. 4.

¹⁹¹*Ibid.*, s. 2.

MAGISTRATE'S MONTHLY RETURN

(TO INCLUDE EVERY CASE WHETHER CONVICTION MADE OR NOT)

MAGISTRATE FOR THE PROVINCE

0.5. Hollands

OF ONTARIO MAKE OATH AND SAY THAT I HAVE EXAMINED AND CHECKED ALL ITEMS

APPEARING IN THIS RETURN CONSISTING OF SHEETS AND DO HEREBY CERTIFY THAT TO THE BEST

OF MY KNOWLEDGE AND BELIEF THAT IT IS A TRUE AND

COMPLETE STATEMENT OF THE TRANSACTIONS IN MY COURT, FOR THE MONTH OF

BEGUN AT NEWMARKET THIS 13th DAY OF Sept. 19 61

MADE BY ME

0.5. Hollands

MAGISTRATE

COUNTY OF YORK, FOR THE MONTH ENDING 30th Sept. 19 61

INSTRUCTIONS

ALL AMOUNTS COLUMN ON BACK PAGE MUST BE TOTALLED AND CARRIED FORWARD TO A GRAND TOTAL ON PAGE 48. THE TOTAL MUST BE CHECKED AGAINST THE TOTAL ON THE BACK OF THE LAST SHEET. ONLY THE AMOUNT OF FINES AND FEES ACTUALLY PAID ARE TO BE SHOWN IN THE "FINES" COLUMN. THE AMOUNT OF FINES AND FEES ACTUALLY PAID ARE TO BE SHOWN IN THE "FINES" COLUMN. WHERE AN OPTIONAL GOAL SENTENCE IS TAKEN OR OTHER JUDGEMENT RENDERED THE SAME IS TO BE SHOWN UNDER "REMARKS".

THIS FORM MUST BE SIGNED BY THE OFFICATING MAGISTRATE AND AFFIDAVIT COMPLETED ON LAST SHEET OF EACH MONTHLY RETURN.

A. GOSWAMIAK PC

MAGISTRATE

THIS RETURN CONSISTS OF SHEETS

NO. OF SHEET	PROSECUTOR (IF PROSECUTED BY OFFICER WRITE "PO" AFTER NAME)	DEFENDANT	NATURE OF CHARGE STATUTE & SECTION	WHERE OFFENCE COMMITTED	DATE HEARD	FINES PAID (DO NOT INCLUDE IN THESE AMOUNTS)				FINES PAID (DO NOT INCLUDE IN THESE AMOUNTS)				REMARKS	
						PROSECUTOR TREASURER	MUNICIPAL (MUNICIPALITY BY-LAW)	FEDERAL DEPT-T	LOCAL CITY	MAGISTRATE	PROSECUTOR	OFFICIAL FEE	ADJUDICATOR FEE		CLERK FEE	RE-ENTRY FEE
7108	A. Garvey	CHRISTIAN	Liquor, 42.1 LCA	M. O'LEARY TWP.	1961	Sept 22nd 63 3491 50 8133 00 677 50 110 00 540 00 107 93 118 20 590 00 64 80 445 00 4 50 728 20 568 00								Dismissed BUTTONVILLE COURT, (J.A. Fleming Pres. JP) 2632	
7109	C. Cox	GREENEY	Park on Hwy., 89.1 HTA	MAREHAM TWP.	29	11 50									2798
7110	"	MONTGOMERY	Speeding, HTA	"	29	13 50									2826
7111	"	WELLES	"	"	29	19 50									83717
7112	"	MILLARD	"	"	29	39 50									2733
7113	R. Madden PC	McKILLIAN	"	"	29	20 50									
7114	"	QUINN	"	"	29	13 50									2686
7115	"	ANGOTT	"	"	29	13 50									
7116	"	FLISAS	"	"	29	11 50									2761
7117	"	HENDERSON	"	"	29	20 50									83718
7118	"	RASMUSSEN	"	"	29	13 50									2965
7119	"	KITCHEN	"	"	29	13 50									83719
7120	"	WEICK	"	"	29	16 50									31600
7121	"	WINGER	"	"	29	11 50									
7122	"	LOULEY	"	"	29	6 50									2814
7123	"	ELLIOTT	"	"	29	7 50									
7124	"	DOLLERY	"	"	29	7 50									
7125	"	CLAIR	"	"	29	7 50									
7126	"	CAMERON	"	"	29	7 50									
7127	A. Chadwick PC	HARELIS	"	"	29	7 50									
7128	"	HOOPER	"	"	29	7 50									
7129	"	BOOKER	"	"	29	7 50									
7130	"	CONWAY	"	"	29	7 50									
7131	"	COSTELLO	"	"	29	7 50									

O.S. Hollinrake

MAGISTRATE FOR THE PROVINCE

OF ONTARIO MAKE OATH AND SAY THAT I HAVE EXAMINED AND CHECKED ALL ITEMS

APPEARING IN THIS RETURN CONSISTING OF

SHEETS AND DO HEREBY CERTIFY THAT TO THE BEST

OF MY KNOWLEDGE AND BELIEF THEY ARE TRUE AND

COMPLETE STATEMENT OF THE TRANSACTIONS IN MY COURT, FOR THE MONTH OF
 SWORN AT NEWMARKET THIS 13th DAY OF Oct. 18 61
 Sept. 19 61

MADE BY ME O.S. Hollinrake

COUNTY OF YORK. FOR THE MONTH ENDING 30th Sept.

MAGISTRATE

19 62

MAGISTRATE'S MONTHLY RETURN

(TO INCLUDE EVERY CASE WHETHER CONVICTION MADE OR NOT)

ALL AMOUNT COLUMNS ON EACH PAGE MUST BE TOTALLED AND CARRIED FORWARD TO A GRAND TOTAL ON THE LAST PAGE OF THE MONTHLY STATEMENT SHEET FOR THE MONTH.

ONLY THE AMOUNT OF FINES AND FEES ACTUALLY PAID ARE TO BE SHOWN IN THE "FINES AND FEES COLUMNS."

WHERE AN OPTIONAL GOAL SENTENCE IS TAKEN OR OTHER JUDGEMENT RENDERED THE SAME IS TO BE SHOWN UNDER "REMARKS."

THIS FORM MUST BE SIGNED BY THE OFFICIATING MAGISTRATE AND AFFIDAVIT COMPLETED ON LAST SHEET OF EACH MONTHLY RETURN

COMMUNIST PARTY
MAGISTRATE

THIS RETURN CONSISTS OF

[illegible]

MAGISTRATE'S MONTHLY RETURN

(TO INCLUDE EVERY CASE WHETHER CONVICTION MADE OR NOT)

INSTRUCTIONS

OF ONTARIO, MAKE OATH AND SAY THAT I HAVE EXAMINED AND CHECKED ALL ITEMS

APPEARING IN THIS RETURN, CONSISTING OF 49 SHEETS AND DO HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF THAT IT IS A TRUE AND

WORN AT NEWMARKET THIS 13th DAY OF September 1861

MADE BY ME
O.S. Hollinsake

MAGISTRATE

COUNTY OF YORK, FOR THE MONTH ENDING September 30th 1961

THIS FORM MUST BE SIGNED BY THE OFFICIATING MAGISTRATE AND AFFIDAVIT COMPLETED ON LAST SHEET OF EACH MONTHLY RETURN.

[illegible]

1624:50

Total:

Magistrates Monthly Summary NEWMARKET

(Original to be sent to Inspector of Legal Offices and one copy retained in Office.)

County or District of YORKMonth of September year 1961TOTAL NUMBER OF CASES THIS MONTH 1025

Municipality	Gross Fines	Percentage Distribution	Due Municipality	Add: Special Municipal Fines, Fees, etc. or DEDUCT: Other Payments Made on Behalf of Municipality	Total to Municipality	
Newmarket	\$ 480.50	34.05228%	\$ 163.62	C.F. 6.00	\$ 169.62	
Aurora	787.50		268.16	C.F. 11.00 less W.F. 24.30	254.86	
Twp. North Gwillimbury	508.00		172.99	C.F. 13.00 less W.F. 20.00	165.99	
Twp. Vaughan	1,234.50		420.38	C.F. 9.00 less W.F. 116.00	313.38	
Markham Village	405.00		137.91	C.F. 1.00	138.91	
Twp. Whitchurch	1,257.00		428.04	C.F. 6.50 less W.F. 14.00	70.81	\$420.54 net
Twp. East Gwillimbury	275.50		93.81	C.F. 3.00 less W.F. 26.00	24.13	Whit. Twp. ret.
Twp. King	250.00		85.13	C.F. 3.00 less W.F. 64.00	158.41	to be ded. Nov.
Twp. Markham	1,167.00		397.39	C.F. 4.82 less W.F. 243.80	148.87	return.
Richmond Hill	429.50		146.26	C.F. 2.61	271.44	
Sutton	756.00		257.44	C.F. 14.00	11.51	
Twp. Georgina	25.00		8.51	C.F. 3.00	31.94	
Stouffville	85.00		28.94	C.F. 3.00	154.02	
Woodbridge	443.50		151.02	C.F. 3.00	50.07	
King City	311.50		106.07	C.F. 1.00 less W.F. 57.00		
				"Note"		
				C.F. Constable Fees		
				W.F. Witness Fees		
TOTAL	\$ 8,415.50		\$ 2,865.67		\$ 1,963.96	

Gross—Municipal Fines..... 8,415.50
 LESS: Office Expenditure.. 3,639.39
 Amount sub. to Division..... 4,776.11
 *2/5 Due Prov. Treas..... 1,910.44
 Magistrates Act, 1932 (Sec. 19) as amended
 by Statutes 1954, ch. 48 (3)
 Due Municipalities..... 2,865.67

PERCENTAGE DISB.

MUNICIPALITIES:

841550)28656700(34.05228

2524650

3410200

3366200

4400000

4207750

1922500

1683100

2394000

1683100

7109000

6732400

376600

MONTHLY OFFICE EXPENDITURES (in detail)

RECEIPTED VOUCHERS MUST BE ATTACHED FOR ALL PAYMENTS

OFFICE SALARIES:

\$2,964.14 ✓

(see listing attached sheet)

OTHER
(indicate nature of expense):

1,082.69 ✓

(see listing attached sheet)

4,046.83 ✓

Less Whit. Twp. ret. for August \$109.64 ✓

*Less Rep. Fees Recovered.....\$ 67.30 ✓

*Less J.P. Fees Recovered..... 230.50 ✓

407.44 ✓

Net 3,639.39 ✓

*Applicable only when on full office salary and not entitled to fees. (Transcripts do not apply.)

STATEMENT OF REMITTANCE TO PROVINCIAL TREASURER

*PROPORTION OF MUNICIPAL FINES..... \$1,910.44 ✓
 TOTAL PROVINCIAL FINES, as per Return..... 2,501.50 ✓
 MAGISTRATE FEES, as per Return..... 556.00 ✓
 O.P.P. FEES, as per Detailed Statement attached (Const.). 25.00 ✓
 MISCELLANEOUS, Detail.....
 4,992.94 ✓

*LESS:

80.80 ✓

Crown Witness Fees Paid—

For Department of Highways.....\$80.80 ✓

" " Lands and Forests.....

" Others.....

CHEQUE TO PROV. TREASURER OF ONTARIO..... \$4,912.14 ✓

Certified Correct:

*Witness Fee Sheets with signature of payee or number of cheque thereon must be attached.

DATE: Oct. 18th/61

R. Hulse

Clerk of the Court

AM—58-3077

O.S. Hollinrake, Q.C. Magistrate

CHAPTER 60

Summary of Conclusions and Recommendations for the Future Financial Responsibility for the Machinery of Justice in the Province

THE machinery of justice in the Province must be considered in the light of its historical evolution and the underlying theory of the sociological responsibility for the maintenance of an orderly and law-abiding community.

One hundred years ago the central government of the Province could not assume a strong and effective administrative position. The Province was sparsely populated, commerce was localized, cities and towns were poorly linked together by inferior modes of transportation without the benefit of telephone and telegraphic communications. Most of the administrative services of government had to be performed on the local level, not only because local government was then the most effective and efficient mode of government, but because it was part of the parochial philosophy of that generation.

As nineteenth century conditions passed and twentieth century conditions developed, much of the parochial philosophy of the nineteenth century still prevailed. The cause may not be readily apparent, but what is clear is that the Legislature had no clearly defined objectives in the field of

financial responsibility for the administration of justice. The result is that many of the principles and practices of 1867 still remain. Since there has been no clearly defined pattern of legislation, what exists today is the result of many *ad hoc* solutions made to problems as they arose. Our statutory analysis shows that, with the exception of the provisional judicial districts, we are left with a dual responsibility for the payment of the costs of administering justice. This responsibility is characterized by confusion, inconsistency and inequality, with no rational basis to justify it other than the nineteenth century philosophy of local responsibility. Clearly the practices and philosophies suitable in 1867, which have been carried over to 1967, are quite irrelevant to the needs of present-day society.

Is the administration of justice today truly a local matter? We think it is not. It is the view of this Commission that the entire Province benefits from the protection granted by the law and from its efficient administration, and likewise the entire Province suffers from its inefficient administration. In the field of criminal law, the argument that a municipality must bear the costs of prosecuting one who committed a crime within its boundaries is fallacious because the crime is not committed against the municipality, but against the State. It is the people of the Province who benefit when the accused is brought to justice. In many instances the offender is a stranger to the community and it is only by chance that the offence was committed in a particular municipality, e.g., in Toronto, Hamilton or Timmins. On the one hand, if the offence happens to be committed in Toronto, the costs are imposed on Toronto; but if the offence happens to be committed in Timmins, the costs are imposed on the provincial government.

Many offences are not committed within the territorial limitations of any municipality but are of such a nature that they extend to many municipalities. An offence may be tried in any municipality in which an overt act was done in furtherance of the crime. There are many cases where the sufferers from crime may be scattered all over the Province, e.g., security frauds and large-scale embezzlements. There is no sound

basis on which the costs of such prosecutions, which may be very long and very expensive, should be imposed on any one municipality.

What we have said about the cost of administering criminal justice is equally applicable to the cost of administering civil justice. Civil litigation is not localized in any city or county and, with certain exceptions, the plaintiff's solicitors have the right to name the place of trial. The rule governing the place of trial is:

"245. Subject to any special statutory provisions, the place of trial of an action shall be regulated as follows:

1. The plaintiff in his statement of claim shall name the county town at which he proposes that the action shall be tried.
2. Where the cause of action arose and the parties reside in the same county, the place to be named shall be the county town of that county.
3. Except in mortgage actions, where possession of land is claimed, the place to be named shall be the county town of the county in which the land is situate.
4. In matrimonial causes, if the plaintiff is resident in Ontario, the place to be named shall be in the county town of the county in which the plaintiff resides.
5. The action shall be tried at the place so named, unless otherwise ordered upon the application of either party."¹

The provisions of this Rule have little relevance to the question of which municipality should bear the costs of a trial. For example, an automobile accident may occur in Peel County but the parties may reside anywhere in Ontario, in any county or district. Any county town may be named as the place of trial, subject only to an order of the court which is not based on what municipality should be responsible for the costs, but on the preponderance of convenience to the parties. The only statutory provision with regard to costs, where an order is made changing the venue, is that contained in the Judicature Act:

"60. (1) Where an order is made changing the place of trial from one county to another on the ground that a fair trial can-

¹The Rules of Practice and Procedure of the Supreme Court of Ontario, Rule 245.

not be had in the first-mentioned county, the first-mentioned county shall pay to the county in which the trial is held all additional expenses that the last-mentioned county incurs by reason of the change of venue.

(2) Where an order is made changing the place of trial from a provisional judicial district to a county on the ground that a fair trial cannot be had in the district, the county shall be repaid all additional expenses that it incurs by reason of the change of venue out of the Consolidated Revenue Fund, and where an order is made changing the place of trial from a county to a provisional judicial district on the ground that a fair trial cannot be had in the county, all additional expenses incurred by reason of the change of venue shall be repaid to the Treasurer of Ontario by the county.

(3) Any amount payable by one county to another or by a county to the Treasurer of Ontario under this section is a debt recoverable by the county or the Treasurer of Ontario, as the case may be, by action in any court of competent jurisdiction.”²

The language of this section is more appropriate for application to criminal cases than to civil cases. Under the Criminal Code a change of venue may be ordered if “it appears expedient to the ends of justice”.³ This section is merely a codification of the common law.⁴ Different phrases have been used by different judges in determining when an order for change of venue should be made, but the phrase in Archbold’s work⁵ seems to be comprehensive: “. . . whenever it is necessary for the purpose of securing, so far as possible, a fair and impartial trial”. No doubt that body of law forms the basis for the provisions of the Judicature Act for contribution by one municipality to another when an order for change of venue has been made.

If this assumption is correct, there is no provision for contribution in civil cases, where the criterion for an order for a change of place of trial is quite different. Even if the provisions of the Judicature Act apply to civil cases they are incongruous. The solicitor for the plaintiff is in the dominant

²R.S.O. 1960, c. 197, s. 60

³Crim. Code, s. 508.

⁴*Rex v. Adams*, [1946] O.R. 506.

⁵Archbold, *Criminal Pleading, Evidence and Practice* (31st ed.), 92-3.

position; the place of trial may be dictated for his convenience, the convenience of both solicitors, as is not infrequently the case, or the convenience of witnesses. The result is that in the great majority of cases the place of trial has little relation to where the cause of action arose.

The administration of justice in its widest sense has passed from being something of merely local concern to a matter of general concern. The provision of adequate and proper facilities to efficiently and effectively administer justice is the common concern and right of every citizen of the Province.

The fact that the Province has assumed the financial responsibility for the administration of justice in the provisional judicial districts, is ample illustration of the philosophy that the administration of justice is not merely a local or municipal matter. It also illustrates the inconsistency and unevenness found in the present system. A few specific examples will serve as illustrations:

1. The provincial courts of justice, such as the High Court and the county court, are courts which bear the seal of the Province and administer the laws in the Province, but they must be provided for and maintained by municipal funds. Court officers, on the other hand, are appointed and remunerated by the Province.

2. The local municipalities must acquire and pay the salaries of court reporters in the county courts, the magistrates' courts, the division courts and at coroners' inquests. The Province provides and remunerates court reporters in the Supreme Court and the district courts. Quite apart from any other aspect of inconsistency, the reporters remunerated by the Province are, generally speaking, better paid than their counterparts who must rely upon local municipalities for their remuneration.

3. In the juvenile and family courts, certain officers are appointed and remunerated by the Province, while others are appointed and remunerated by the local municipalities. The result is that two employees working side by side and performing essentially the same duties will earn different salaries because one is paid by the Province and the other by the municipality.

In addition, they will have different fringe benefits such as pensions, sick benefits and vacation allowances. Under this system it sometimes occurs that those occupying more responsible positions in an office connected with the administration of justice do not receive as much remuneration as those occupying less responsible positions.

A slight move was made in 1966 towards what we think is the right objective. The Attorney General was empowered to enter into an agreement with the council or councils of any municipality or municipalities for which a juvenile and family court is established, providing for the administration and operation by the Province of the court, together with the payment of the operational costs.⁶ In 1962 provision was made for provincial contributions to the municipalities for ten per cent of the cost of maintaining jails.⁷

4. Because of the dual responsibility of the Province and the municipalities, and as a result of the fact that in many instances the county shares the cost of administering its court house and jails with certain cities and towns separated from the county for municipal purposes, much time and effort is required to complete a multitude of forms and accounts and to provide for the apportionment and distribution of funds. This is well illustrated in the instance of the Magistrates Act⁸ and the Municipal Act.⁹

5. Some municipalities are more affluent than others. The result has been that some communities are able to provide proper accommodation for the courts and jails, while in other communities facilities are not only inadequate but such that they demean the administration of justice.

The Commission had the benefit of the wisdom and knowledge of William B. Common, Q.C., who has had very wide experience in the matters we are discussing. He was Deputy Attorney General of the Province of Ontario for eight years, prior to his retirement in 1964, and before that was the Director of Public Prosecutions for eleven years, and was associated with the Attorney General's Department for many

⁶Juvenile and Family Courts Act, R.S.O. 1960, c. 201, s. 14a, as enacted by Ont. 1966, c. 75.

⁷Jails Act, R.S.O. 1960, c. 195, s. 8a, as enacted by Ont. 1961-62, c. 64.

⁸See pp. 902-04 *supra*.

⁹See pp. 904-06 *supra*.

years previously. In testifying before the Commission, Mr. Common dealt with many aspects of the problem. In discussing the responsibilities for reporting and accounting placed upon the magistrates he stated:

"... [I]n regard to the overall principle of the contribution by municipalities or the province I feel that the efficiency of the officials is fettered by . . . [the] requirements of the huge amount of paperwork required to accurately set forth the percentage which is due to the province and the percentage which is payable to the municipality, and by the very nature of the returns that have to be made. In fact one can only conclude that this cuts down the efficiency of the office. Much time of these officials is consumed in doing this work which could more profitably be utilized in a discharge of their judicial duties."

Mr. Common pointed out that in some municipalities the magistrate does not have a clerk and must therefore do all this work himself: He added:

"It does not seem proper for a judicial officer to have to do this for one thing, and the other thing is his time should not be taken up with these purely laborious administrative duties which could be eliminated by the Province taking over the full cost of the administration of justice."

With regard to the juvenile and family courts, Mr. Common said:

"... [A]s the municipality has to bear the cost of the administration of . . . these courts . . . the judge in a great number of instances has to appear before the council of the municipality and present his budget. Now, we have had some rather undignified instances in Metropolitan Toronto where the senior judge has perforce been required to go down and bargain with the executive council of Metropolitan Toronto to get X thousand dollars to run his court. This, I think, is most undignified and should not be his responsibility or . . . within his purview of official duties to worry about the financial and physical requirements of the court. It is true that under the Act he is responsible for the administration of the court but he should not, in my respectful opinion, be required to haggle with council for money required for this very important branch of the administration of justice."

Mr. Common was asked to compare the facilities for and the efficiency of the administration of justice in the provisional

judicial districts with those of the rest of the Province. He replied:

"... [T]here is no comparison ... [T]here is greater efficiency resulting from the fact that the province pays the whole cost. There is not this division of payment and not the paperwork involved and not the petty jealousies that keep cropping up from time to time in this regard. In my experience ... when you have one [responsibility] ... [there is] far better efficiency from the officials who are charged with their respective duties than you have in the county under the county system where there is this dual aspect which requires a great deal of paperwork, at the municipal level. The Association of Reeves and Mayors, every year in their brief that comes to the government, submits that the province should take over the cost of the administration of justice as it has in the districts because it is more satisfactory in the end result for the administration of justice."

Mr. Common had no doubt that if the Province assumed the entire financial responsibility for the machinery of justice, a more efficient administration of justice and an overall saving of money would result.

RECOMMENDATIONS

We believe that justice is most effectively administered by a central authority, as no reasonable basis exists for requiring the local municipalities to provide services for law enforcement, with the exception of local police forces. We recommend:

1. The Province of Ontario should assume the entire financial responsibility for the machinery of justice, including the provision and maintenance of all necessary facilities and the appointment and remuneration of all persons necessary to administer justice, with the exception of the members of municipal police forces and those officials appointed by the Federal Government.
2. No person convicted for an offence should be required to subsidize the expense of his trial by having costs thereof levied against him.

3. All fines imposed as penalties for the contravention of any statute (except the fines that are payable to the Federal Government) should be wholly paid over to the Province of Ontario.
4. No person, acting either as informer or prosecutor or in any capacity, should be entitled to any share or proportion of any fine levied.
5. The practice of municipal solicitors, by-law enforcement officers and others acting as prosecuting attorneys upon trials for violations of municipal by-laws, or upon private prosecutions should be revised, and all prosecutions should be conducted by crown attorneys or under their supervision. It may not be practical for crown attorneys to attend at all prosecutions for minor offences, but they should have supervision over all prosecutions.
6. The Province should, by agreement, make financial adjustments with those municipalities that have provided suitable facilities for the administration of justice.
7. The Province should enter into whatever financial arrangement may prove practicable with the Government of Canada, whereby the Government of Canada would pay to the Province a proportion of the costs incurred by the Province in administering the laws of Canada in the provincial courts, in cases where fines or penalties imposed are paid to the Government of Canada.

Section 6

THE ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

CHAPTER 61

The Office of the Attorney General

THE office of the Attorney General in this Province antedates Confederation. It was recognized in the British North America Act,¹ but nowhere are the powers, functions and duties of the office set out by statute. Certain traditional powers are conferred on the holder of the office under the Criminal Code, which are unnecessary to develop in the present discussion.

Under the British North America Act, all rights, powers, duties, functions, responsibilities or authorities vested in or imposed on the Attorney General by any law, statute, or ordinance of Upper Canada, are vested in the person appointed to that office, until the Legislature of Ontario otherwise provides.²

Since there is no specific legislation defining these duties, resort must be had to the common law. It is wise that in large measure this should be so, and it would be unwise to attempt to codify the law with respect to all powers, functions and duties of the office. In no province has this been done. Nevertheless, we think that it would be useful to define in express language some of the powers, functions and duties pertaining to the office, as has been done in seven of the provinces in Canada and by the Federal Parliament with respect to the

¹B.N.A. Act, s. 134.

²*Ibid.*, s. 135.

office of the Attorney General of Canada. This we shall discuss in more detail later.

The Attorney General is the chief law officer of the Crown and in that sense is an officer of the public. It is to him that the individual must look for the protection of his civil rights, whether it be through the enforcement of the criminal law—to provide adequate protection of the innocent and ensure as far as possible the just punishment of the guilty—or whether it be as guardian of the interests of the public against legislation that may confer excessive or oppressive powers on tribunals, bodies or individuals.

As the chief law officer of the Crown, the Attorney General performs two main functions. He is the Queen's Attorney and as such is responsible for the public, as distinct from the private, prosecution of offenders, and he is the responsible adviser of the Government with respect to legislation. Historically and traditionally, in the exercise of these functions the holder of the office must exercise a degree of independence quite different from that required of any other member of the Cabinet.

Throughout English history, much responsible opinion has been against the Attorney General's being a member of the Cabinet. In earlier years the Attorney General was not permitted to be a member of the House of Commons. Those who maintained this point of view contended that the duties of the office were such that he was required to exercise a degree of independence that would be inconsistent with his being a member of the Cabinet or even a member of Parliament. The early arguments were based on constitutional grounds that have never been applicable in Canada. These grounds involved the conflict between the authority of the House of Lords and of the Commons.

In its origin, the function of the Attorney General was to conduct suits, particularly prosecutions, on behalf of the sovereign. He later became an adviser to the House of Lords, and at the beginning of the sixteenth century he was "the principal go-between the two Houses of Parliament, carrying bills and messages from the Lords to the Commons, and drafting or amending parliamentary measures when called

upon to do so".³ It is unnecessary to discuss here the debate that raged in England for and against the propriety of the Attorney General's being both a member of the House of Commons and a member of the Cabinet. It is sufficient to say that only in recent years in England has he been a member of the Cabinet.

The situation has been otherwise in Canada, but it was not accepted without argument. In 1850 the Select Committee appointed to inquire into the state of public income and expenditure of the Province of Canada heard conflicting testimony from former and present law officers on the desirability of changing the political character of the office of Attorney General in Upper Canada. Mr. John Hilliard Cameron, Q.C., a former Solicitor General of Upper Canada, was in favour of excluding the Attorney General from the provincial Cabinet on the ground that: "The Law Officers at present are obliged to give legal opinions, with a knowledge of their political consequence, and be responsible for them. In the mode I propose, the legal opinions given would be totally irrespective of any political bearing, and ought to be independent of the cases to which they may be applied." And, referring to the fact that the Attorney General and Solicitor General of England are not Cabinet Ministers, he said: "In consequence, their legal opinions upon questions proposed by the government are given without any knowledge of the inducements to such opinions being asked or the political consequences to flow from their answers."⁴

The view taken by the Attorney General for Lower Canada before the Committee was that membership in the Cabinet was essential as long as the Attorney General occupied a position as head of an administrative department. Although the subject was not dealt with in the Report of the Committee, the view of the Attorney General of Lower Canada is the one that prevailed both before and since Confederation, and it appears to be the sound view. The Attorney General must be answerable to the Legislature and it is better that he be answerable as a Minister of the Crown. Notwithstanding that this is so, he must of necessity occupy a different

³Edwards, *The Law Officers of the Crown*, 34.

⁴*Ibid.*, 166.

position politically from all other Ministers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the Government. He must decide when to prosecute and when to discontinue a prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney, not as a member of the government of the day. Professor Edwards, in his admirable book, sums up the matter in this way:

"Care, however, must be taken to distinguish between two separate aspects of the Attorney-General's and Solicitor-General's criminal law responsibilities, since failure to do so may unwittingly result in a weakening of the doctrine of independence. First, it is now well recognised that any practice savouring of political pressure, either by the executive or Parliament, being brought to bear upon the Law Officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be avoided at all costs. Acceptance of this first principle, however, in no way minimises the complementary doctrine of the Law Officers' ultimate responsibility to Parliament, in effect the House of Commons, for the exercise of their discretionary powers. To be explicit, it is conceived that, *after the termination of the particular criminal proceedings*, the Attorney-General or the Solicitor-General, as the case may be, is subject to questioning by members of the House in the same way as any other Minister of the Crown. Like any other Minister they are answerable for their ministerial actions."⁵

The duty of the Attorney General, to give legal advice on legislation and to advise departments of government, requires a lesser degree of independence than his decision to prosecute or to discontinue a prosecution. In that capacity he is not in the same sense the adviser of the Queen. Nevertheless, this function requires a substantial degree of independence. The members of the public must be dependent on the vigilance of the Attorney General for their protection against legislative invasion of their civil rights. Departments of government must realize that in advising on legislation and advising

⁵*Ibid.*, 224. Author's italics.

departments, the Attorney General has a duty that transcends government policy, in the performance of which he is responsible only to the Legislature. This we shall discuss in greater detail later.

Until 1966 many duties were imposed on the Attorney General that were in no way relevant to his traditional office and in many cases those duties conflicted with his traditional functions. Many of the officers for whom he was responsible performed licensing duties, conducted investigations and exercised judicial powers and delegated legislative powers. In some cases the Attorney General was required to prosecute individuals for breaches of the criminal law, notwithstanding that the same individuals had already been disciplined by a tribunal for which he was responsible.

In 1966 the responsibility for the administration of thirteen Acts that were not related to the office of the Attorney General was transferred to the Minister of Financial and Commercial Affairs.⁶ The Acts were:

The Bailiffs Act, 1960-61

The Collection Agencies Act

The Credit Unions Act

The Deposits Regulation Act, 1962-63

The Insurance Act

The Investment Contracts Act

The Loan and Trust Corporations Act

The Marine Insurance Act

The Mortgage Brokers Registration Act

The Prepaid Hospital and Medical Services Act

The Real Estate and Business Brokers Act

The Securities Act, 1966

The Used Car Dealers Act, 1964

⁶Department of Commercial and Financial Affairs Act, Ont. 1966, c. 41, s. 4.

CHAPTER 62

Functions and Duties of the Attorney General

THE functions and duties of the Attorney General as they have developed in this Province may be considered under the following headings:

- (1) Supervision of the machinery of justice;
- (2) Supervision of law enforcement;
- (3) Supervision of government litigation;
- (4) Supervision of legislation.

SUPERVISION OF THE MACHINERY OF JUSTICE

In broad outline, supervision of the machinery of justice involves: supervision of the Ontario Provincial Police; the appointment and supervision of the staff necessary for the administration of justice; the supervision of crown attorneys, the Public Trustee, the Official Guardian, the probation officers, and the Accountant of the Supreme Court. In addition, the Attorney General is responsible for recommending the appointment of magistrates, crown attorneys, juvenile and family court judges, division court judges who are not county or district court judges, and for the administration of the law respecting the registration of titles to real property.

Elsewhere in this Report we deal with many aspects of the functions performed by those for whose appointment the Attorney General is responsible. While it is not part of our duty to make a detailed study of the operation of the machinery of justice in all its aspects, we are concerned with its

operation in providing adequate protection for the civil rights of the individuals making up the community.

An unfortunate aspect of the machinery of justice in this Province is that it is not entirely under the control of the Province. In some cases the local authorities provide accommodation for its operation in whole or in part, and in some cases this is provided by the Province. In some cases the staff is in part provided by the local authorities and in part provided by the Province, and in other cases the staff is provided in whole by the Province. These matters we have fully discussed in Section 5 of this Part.

If the machinery of justice is to operate efficiently, it is essential that the full responsibility for its operation be placed on the Attorney General. It is equally important that the staff engaged in the operation of the machinery of justice should be highly qualified and well paid. Efficiency is dependent on the quality of those engaged in the day-to-day operation of the courts. On the whole, in this Province we have been particularly fortunate with respect to the quality of the staff engaged in the courts, but too often the margin of reasonable compensation for the services rendered has been so narrow that competent and qualified members of the staff have been forced to abandon this branch of public service for economic reasons.

SUPERVISION OF LAW ENFORCEMENT

Law enforcement may be divided into three main branches which have no clear lines of demarcation: investigation, policing and prosecution. We have dealt at length with investigation and certain aspects of the exercise of police powers elsewhere in this Report.¹

We are particularly concerned here with the duties of the Attorney General as they relate to the prosecution of offenders and to law enforcement through the administration of justice.

The effectiveness of all legislation for the protection of the civil rights of the individual depends on good law enforcement. The individual has a right to be protected from unwarranted police action, but likewise the peaceful citizen has

¹See Part I, Section 5, and Chapter 47 *supra*.

a right to all the protection of the law enforcement agencies against unjustified invasion of his basic and fundamental civil rights. Too often the focus is misplaced and the rights of peaceful members of society are forgotten.

In this Province we have entered upon a new era which creates special problems for the law enforcement agencies. Modern means of transportation, the automobile and the aeroplane, together with modern means of communication, two-way radio systems and electronic listening devices, have become as available for use by organized and unorganized criminal elements as they are for the peaceful purposes of society. In some areas on this continent organized crime has become so developed as to impair the power and authority of government. The protection of the rights of the individual requires that all the advances of technology be made available to law enforcement agencies with proper safeguards. It is no trespass on the civil rights of the individual that every scientific means of detecting crime should be properly used for the protection of the public interest. Geography has placed us alongside a nation with different laws and different means of law enforcement. It is a recognized fact that organized crime abroad is prepared to reach its tentacles into this Province in such a way as to make residents of the Province in some degree subject to the power of criminal elements from abroad. The right of the individual to the protection of his civil rights under law does not extend to the safeguarding of the lawless against all reasonable and proper means of detecting his lawlessness.

Representations were made to the Commission to the effect that legislation should be passed restricting the use of wire-tapping and listening devices by police officers. Some representations were made suggesting that the right of police officers to question persons accused of crime should be restrained or restricted. These representations raise difficult problems, but they are problems that must be solved by a realistic and unemotional approach. It is hard to follow the logic of the contention that it should be unlawful to intercept a message passed as part of a plot to rob or assassinate,

while the robbers or assassins should have free use of all scientific means of communication. What gives rise to misgivings is that there might be an unwarranted invasion of the privacy of the individual by the exercise of police powers of interception of communications. The question is one of balance and regulation. Where law enforcement agencies have reasonable ground to believe that means of communication are to be used for the advancement of crime, they should be given means to secure power to intercept messages. This is no greater trespass on the rights of the individual than the power now conferred on a peace officer to arrest without a warrant, or to get search warrants upon application to a justice of the peace.

The control over the exercise of such power should undoubtedly be strict, but nevertheless the power should exist. It does not seem logical that a power should be conferred on a police officer to deprive a man of his liberty by arresting him if he has reasonable and probable grounds to believe that he has committed an indictable offence, but that he should not have power to intercept a message if he can demonstrate to a judicial officer that there are reasonable and probable grounds to believe that the message is being used for the advancement of the commission of a crime.

In large measure any change in the law would be beyond the powers of the Legislature of the Province and beyond the Terms of Reference of this Commission.

Supervision of Prosecutions on Behalf of the Crown

As we have indicated earlier in this Section, one of the most important historic and traditional duties of the Attorney General has been to direct, and in many cases participate in, the prosecution of criminal cases. In England the holder of the office frequently appears personally in the courts to carry out these duties. In Canada we have adopted a system somewhat patterned on that of Scotland.²

Prosecutions on behalf of the Crown are conducted by agents of the Attorney General—crown attorneys or counsel specially appointed.

²For a brief description of the Scottish system, see Chapter 49 *supra*.

The duties and functions of crown attorneys are defined by statute.³ Formerly it was the practice in the Province to appoint special counsel to prosecute all cases at sittings of assizes in the Province. These duties are now usually performed by the crown attorneys. If the law is to be properly enforced, it must be recognized that the office of Crown Attorney requires highly developed professional skill in advocacy. Advocacy is not a talent that can be acquired by mere appointment to an office. Crown counsel is frequently matched against the best legal talent available. In our adversary system, the interests of the individual will be ill-protected if crown counsel is not equal to his task. The office requires more than skill in advocacy. It requires great capacity to master the detail of involved and difficult cases and great fairness in the conduct of them.

To secure and retain young men in this branch of the government service, it is essential that there be a realistic approach to the scale of salaries that must be paid. It is too much to expect of members of the bar, who have the necessary qualifications required of good crown attorneys, to enter and remain in the public service at salaries now paid to the crown attorneys and their assistants. Of the sixty-seven crown attorneys and assistants:

	1	receives a salary of \$20,000 a year;
	17	receive \$15,000 per annum or over;
	11	" \$14,000-\$15,000 per annum;
	7	" \$13,000-\$14,000 " "
	9	" \$12,000-\$13,000 " "
	4	" \$11,000-\$12,000 " "
	3	" \$10,000-\$11,000 " "
	1	" \$ 9,000-\$10,000 " "
	7	" \$ 8,000-\$ 9,000 " "
	4	" \$ 7,000-\$ 8,000 " "
	3	" \$ 6,000-\$ 7,000 " "

With the exception of the City of Toronto and the County of York, in addition to his duties as crown attorney, the holder of the office performs duties as Clerk of the Peace.

³Crown Attorneys Act, R.S.O. 1960, c. 82, ss. 6, 12, 14, 16 and 17.

Eight crown attorneys in the Province are paid on a fee basis and four are on commuted fees. We have discussed elsewhere in this Report the whole question of payment of those engaged in the administration of justice on the basis of fees paid by those who are subject to the administration of justice.⁴ We have recommended abolition of the system. What we said in that chapter applies with emphasis to the payment of counsel appearing on behalf of the Crown on the basis of fees assessed against convicted persons. This system gives to prosecuting counsel a pecuniary interest in obtaining a conviction. A mere statement of the fact should be sufficient to condemn the system. We recommend that all crown attorneys should be placed on a salary basis which is in no way connected with a fee system.

Not only should the salaries of the crown attorneys be substantially increased, but there should be a complete reorganization of their duties.

Crime knows no territorial boundaries. The crown attorneys are appointed for counties. Obviously some will be ill-trained and inexperienced in the prosecution of certain offences. Some are quite inexperienced and ill-trained in the conduct of cases before juries. To meet this situation, an amendment was made to the Crown Attorneys Act in 1964 to provide that in addition to crown attorneys appointed for each county and each judicial district, such crown attorneys and assistant crown attorneys for the Province may be appointed as the Lieutenant Governor in Council considers necessary.^{4a} Three crown attorneys at large have been appointed, and assistant crown attorneys when appointed are at large. These appointments do not fulfil the organizational needs, nor are they a fulfilment of the purposes of the Act.

In order that the efficiency of crown attorneys may be raised, the Province should be divided into districts with a Senior Crown Attorney appointed for each district who should be responsible to the Director of Public Prosecutions. The Senior Crown Attorney should be capable of taking the most difficult and involved cases in his district and he should be

⁴See Chapter 38 *supra*.

^{4a}Crown Attorneys Act, R.S.O. 1960, c. 82, s. 1(1), as amended by Ont. 1964, c. 15, s. 1(1); and s. 1(2), as amended by Ont. 1967, c. 18, s. 1.

charged with the duty of advising, assisting and training the crown attorneys under his supervision. The appointment should not be made on a basis of seniority but should be strictly based on ability. Such reorganization should bring to the enforcement of the law a cohesion and efficiency that cannot be attained under the present system. If the recommendations contained in Section 5 of this Part are implemented, the reorganization of all law enforcement agencies will be greatly facilitated.

SUPERVISION OF GOVERNMENT LITIGATION

Civil litigation on behalf of the government or government agencies covers a wide field, ranging from tort law to involved matters of judicial review of decisions of tribunals, and matters of difficult constitutional law. We have discussed at length in this Report procedure before tribunals, rights of appeal and rights of judicial review. If our recommendations are implemented, it will be necessary to expand the branch of the Attorney General's Department dealing with civil matters. The legal affairs of all government agencies should be under the direct control of the Attorney General. Not infrequently government boards have their own solicitors who are in no way connected with the government service, e.g., the Farm Products Marketing Board, and not infrequently when a decision of a particular tribunal is called in question on judicial review, outside counsel is brought in to argue the case. This practice will not promote a coherent development of policy with respect to the exercise of powers conferred on administrative bodies.

We recommend that all matters brought before the courts should come under the direct supervision of the Attorney General and his staff. He should truly function as Chief Counsel for the Crown, not necessarily by taking cases himself, but by being responsible for the conduct of all cases.

SUPERVISION OF LEGISLATION

The study made by this Commission of the legislation in force in Ontario has convinced us that much of it is drawn for the purpose of advancing particular departmental points of view as to what is in the public interest, without much regard

for the essential consideration of the protection of basic civil rights.

Legal services for the government are provided by twenty-six qualified lawyers attached to the Attorney General's Department, and forty-one, attached to different departments of government. The Attorney General's Department is divided into five main divisions, with the Deputy Attorney General at the apex: Legislative Counsel, Senior Crown Counsel, Criminal Law Division (including Criminal Appeals), Special Prosecutions Branch and Administration of Justice Division (including the Inspector of Legal Offices). Within these divisions the day-to-day legal business of the government is carried on.

The forty-one lawyers attached to the various departments serve mainly as departmental solicitors. Their experience tends to departmentalize them so that their legal advice to the department on ordinary matters that arise daily, and on legislation, does not have the objectivity that is essential for the protection of the broad public interest.

Legislation usually originates in the departments. The social programme to be carried out is formulated by the officials of the Department under the control and supervision of the relevant Minister. A bill is then drafted by the departmental solicitor who, in due course, sometimes very shortly before it is presented to the Legislature, sends it to the Legislative Counsel for revision. Often Legislative Counsel has to perform his duties under the pressure of the urgency of legislative time. In making his revision he, in the main, acts on instructions from the Minister of the Department concerned.

The course presently followed does not, in our opinion, sufficiently recognize that matters of policy to be decided in the preparation of bills fall into two categories:

- (1) Social policy underlying the social programme formulated in the department concerned, which becomes government policy when accepted by the government;
- (2) Legal policy as to the appropriate legal mechanism to be established to carry out the social programme.

Considerations of legal policy are of cardinal importance in preparing bills conferring the power to determine, take

away or change rights of individuals. Earlier in this Report⁵ we enumerated the main aspects of legal policy that must be considered in drafting every bill containing such a power:

1. The appropriate nature and scope of the power;
2. The proper constitutional structure and organization of the tribunals on which the power is conferred;
3. The procedure to safeguard rights to be followed in the exercise of the power;
4. The extent to which provision should be made for reconsideration of initial decisions through appeals;
5. The extent to which proper judicial review should be available; and
6. Provision, where relevant, for compensation where loss or damage will result from the exercise of the power.

Some or all of these matters must be dealt with whatever may be the nature of the social programme under consideration.

The major fault in the present system is that the responsibility for deciding the legal policy to be followed is not placed clearly on the Attorney General, whose constitutional responsibility it is; nor is he given a proper opportunity to discharge it. The departmental solicitor cannot, and should not, be expected to discharge the responsibility of the Attorney General. Although he may have a particular familiarity with the branch of law to which a bill relates, his association with the administrative operation of his department will always tend to restrict his objectivity and breadth of view. His major interest will be to draft a bill that assures the administrators in his department that they can meet any administrative contingency with a minimum of hindrance. The inevitable tendency is to confer broad powers with few procedural requirements and little provision for appeals, in disregard of fundamental legal policy.

Reliance on the departmental solicitor has other disadvantages. A departmental solicitor may not appreciate the extent to which a draft bill may affect other areas of law

⁵Part I, Section 2 *supra*.

or administration. Law in its true sense cannot be departmentalized.

Proposed legislation may require consideration and amendment of other statutes, or modification of the prescribed policy. What may advance a taxation scheme may at the same time affect a welfare scheme, or it may be contrary to legal policy developed for the protection of civil rights.

We are concerned with something much more than orderly drafting. We are concerned with legislative supervision in a broad sense. The duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in the Cabinet. It requires him to exercise constant vigilance to sustain and defend the Rule of Law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways. Sometimes clear language is used, but more often subtle devices are resorted to by incorporating in legislation such phrases as "if the minister is satisfied" and "if the inspector believes". These devices may be just as effective to limit the authority of the courts to control the exercise of the power conferred as would clear, direct language.

Matters dealt with elsewhere in this Report forcibly illustrate the absence in the past, and the need in the future, of organized and purposeful legislative supervision in this Province. For example, in approximately twenty-five different statutes, all the powers of a Supreme Court judge in civil cases "to enforce the attendance of any person and to compel him to give evidence and produce documents and things", (or powers expressed in substantially similar language), are conferred on lay bodies and persons, in some cases on mere inspectors and minor officials. These powers include the power to commit to jail for failing to comply with the orders issued or made by the body or individual. The power to commit to jail for contempt has been conferred on an inspector under the Fire Marshals Act;⁶ on any person appointed by the Minister to conduct an inquiry under the Mining Act;⁷ on one or more persons appointed by the Lieutenant Gover-

⁶R.S.O. 1960, c. 148, s. 13.

⁷R.S.O. 1960, c. 241, s. 619, as enacted by Ont. 1961-62, c. 81, s. 1.

nor in Council under the Private Sanitaria Act;⁸ and on the Workmen's Compensation Board and any member of the Board, or any other person appointed to make an inquiry that it deems necessary.⁹

Powers of investigation have been conferred on boards with reckless abandon, without any statutory safeguards as to non-disclosure of the information obtained to unauthorized persons. There are at least eighty statutes which confer such powers, and in very few is there any restriction on the use of the information gained.¹⁰ There has been a growing indifference to the delegation of legislative authority to the Lieutenant Governor in Council and other bodies. Repeatedly, power is given to the Lieutenant Governor in Council to make regulations "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act or any part thereof". It is a power that is rarely necessary, but it appears with great frequency. In the Conservation Authorities Act, the conservation authority, an appointed body, is given authority to make regulations with the approval of the Lieutenant Governor in Council, to create offences and provide for penalties.¹¹

In the debates during the session of the Legislature in the year 1964, some interest was shown with respect to safeguarding the rights of individuals, but the same Legislature passed the Apprenticeship and Tradesmen's Qualification Act, conferring powers on the Lieutenant Governor in Council to make regulations "defining any expression used in this Act".¹² This amendment provokes the comment that the Legislature was not sure what was meant by the language of the Act, so it divested itself of the responsibility of expressing itself clearly by leaving that matter, not to the courts, but to the Lieutenant Governor in Council. This is an abandonment of legislative responsibility.

We emphasize and make it clear that anything we have said in this Report is not to be taken as a criticism of any Attorney

⁸R.S.O. 1960, c. 307, s. 36.

⁹R.S.O. 1960, c. 437, ss. 65, 75.

¹⁰These matters are discussed fully in Part I, Section 4 *supra*.

¹¹R.S.O. 1960, c. 62, s. 20, as amended by Ont. 1962-63, c. 20, s. 4; and s. 20a, as enacted by Ont. 1960-61, c. 10, s. 1.

¹²Ont. 1964, c. 3, s. 18.

General, or of any legislative counsel, or any member of the Attorney General's staff. This Province has been particularly fortunate in having highly skilled and competent law officers in the Department of the Attorney General. However, our studies clearly indicate that the Attorney General and his staff have never been provided with a proper system under which the responsibility for the supervision of legislation has been properly defined.

If unjustified encroachment on civil rights by the Legislature is to be avoided, a new system of supervision should be developed which will operate in co-operation with the departments of government. The primary responsibility for proposing new legislation rests with the department charged with the social programme to be undertaken. It should first frame the policy that it proposes for the new legislation, which should then be submitted to the Cabinet. If the proposals are approved, preparation of the proposed legislation should be undertaken by draftsmen in the Attorney General's Department. They should take their instructions on the substantive policy of the legislation from the department or the minister concerned, but they should be responsible to the Attorney General for the legal provisions made to carry out that policy. Any major difficulties should be resolved by consultation between the Attorney General and the minister of the department concerned. At the present time draftsmen in the Attorney General's department, although expert and aware of many problems, have no independent responsibility for the content of statutory provisions. At most they may advise or warn, but they may be overruled.

In addition to his supervision of all future legislation, the Attorney General should be charged with the task of revising all legislation now in effect, so that the principles and safeguards recommended in this Report will be applied to past legislation as well as to future legislation. This will be a considerable task, but its size only emphasizes its importance.

CHAPTER 63

Reorganization of Legal Services

THE first step to be taken to obtain organized supervision of the content of legislation, so that the rights of the individual and the public interest will be properly protected, is a reorganization of the legal services in the employ of the departments of government. Ten departments of government have legal services within their own establishments. Lawyers are distributed as follows:

Agricultural	5
Economics and Development	1
Health	1
Highways	6
Labour	3
Lands and Forests	3
Municipal Affairs	2
Transport	2
Public Works	1
Treasury	6

These do not include lawyers who are engaged in administrative capacities.

The fundamental weakness of the system, which gives rise to lack of adherence to sound legislative principles, is that the members of the legal branches of departments of government have no formal communication with the Attorney General, notwithstanding that he is the chief law officer of the Crown and is responsible for the legal aspects of government. If legislation is to follow cohesive principles, there must be

cohesion in the legal services. To attain this end we recommend:

- (1) The Attorney General should have statutory authority. This we shall discuss later.
- (2) There should be a branch of the Attorney General's Department known as the Legislative Branch. This branch should have supervision over the preparation of all legislation and regulations. All Government bills should be drafted in this branch.
- (3) The legal officers of departments should be made members of the staff of the Attorney General, and in the future they should be recruited as such and seconded to departments.
- (4) Legal officers seconded to departments should from time to time be employed in the general legal affairs of government, in order that they may gain a wider legal point of view than is possible when confined to the affairs of a single department.

The reorganization that we have in mind is substantially the same in principle as that partially adopted by the government of Canada. It has been so satisfactory that its extension was recommended by the Glassco Commission.¹ In 1962 the Commission recommended an integrated legal service, with the exception of the Office of Judge Advocate General, the Department of External Affairs, the Department of National Revenue (Taxation), the Department of Veterans Affairs and the Royal Canadian Mounted Police. With these exceptions, the Commission was of the opinion that all legal services of government should be integrated with the Department of Justice. The Commission made this important observation, which is equally applicable to lawyers in the provincial service:

"The value of a lawyer depends on the preservation of his independence from the operating necessities of his department. Secondment from Justice should help to preserve this independence, while opening up opportunities for professional advancement in a legal career service for those solicitors who have, to the present, been locked in isolated departmental compartments."²

¹Report on Government Organization, Vol. 2, 412.

²*Ibid.*, 419.

The Commission felt that an integrated legal service would introduce greater flexibility to meet the intermittent legal needs of some departments, and that it would lead to an improvement in the important matter of rendering legal opinions where current practices cause duplication, delay and a tendency for opinions to be given at arm's length from operating departments.

The Commission was of the opinion that the rotation of Justice lawyers, to departments and back into the Department of Justice, should bring a sufficient touch of reality to the oft-time academic tone of Justice opinions, and at the same time maintain in the departments the appropriate sense of neutrality required in the rendering of impartial legal advice.

It is not clear to us that similar exceptions should be made in Ontario to those suggested by the Glassco Commission for the federal government. It may be that there is a particular sort of expertise that is developed in the Treasury Department, and possibly in the Department of Municipal Affairs, which would warrant exceptions being made among those who are now very senior members of the staff. We have, however, no doubt that less senior members of the staff would be better equipped to assume the responsibility of their seniors in due course if they had a wider basic training in the Attorney General's Department.

LEGAL ADVICE TO DEPARTMENTS

The responsibility of the Attorney General to supervise legislation cannot be dissociated from his responsibility to give legal advice to departments. In those departments where there is a legal staff, the day-to-day need to give legal advice is less exacting, but the Attorney General, as the chief law officer of the Crown, cannot escape the ultimate responsibility for the advice tendered to the government. Since all litigation shall be conducted by the Attorney General, wherever legal advice is required on a matter that may develop into litigation, he should be consulted. The integration of legal services that we have recommended would greatly facilitate the co-ordination of legal advice.

ANNUAL REPORTS

We have recommended³ that a province-wide system of recording statistical information, with respect to the operation of the courts, should be organized. Such a system should apply to all aspects of the office of Attorney General.

From the information made available, the Attorney General should prepare an annual report of the operation of his department for submission to the Legislature. This report should reflect all aspects of the operation of the machinery of justice in the Province, together with the operation of all branches of the Department of the Attorney General.

³Chapter 41, Recommendation 7 *supra*.

CHAPTER 64

An Attorney General Act

ALL the provinces, except New Brunswick, Prince Edward Island and Ontario, have special legislation defining the duties and functions of the Attorney General. The Public Departments Act of Prince Edward Island¹ provides that there shall be a Minister of the Crown styled the Attorney General, "who shall have control of the Administration of Justice in the Province, and who shall be a Barrister of the Supreme Court".² The specific powers of the Attorney General are not spelled out. In the other provinces in which acts have been passed, provision has been made, expressly defining the powers and functions of the Attorney General. The respective acts are substantially the same, with some variations. The Newfoundland Act,³ which is modelled on the other acts in force in the provinces prior to 1952, serves as a useful precedent. For convenience we quote in full the relevant section:

"9. The duties, powers and functions of the Attorney General shall be as follows:

- (a) He shall be the official legal adviser of the Lieutenant-Governor and the legal member of the Executive Council.
- (b) He shall see that the administration of public affairs is in accordance with law.
- (c) He shall have the superintendence of all matters connected with the administration of justice in Newfoundland not within the jurisdiction of the Government of Canada.

¹R.S.P.E.I. 1951, c. 128.

²*Ibid.*, s. 4.

³Attorney General Act, R.S. Nfld. 1952, c. 9.

(d) He shall advise upon the Legislative Acts and proceedings of the Legislature, and generally advise the Crown upon all matters of law referred to him by the Crown.

(e) He shall be entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor-General of England by law or usage, so far as the same powers and duties are applicable to Newfoundland, and also with the powers and duties, which, by the laws of the Dominion of Canada and of Newfoundland to be administered and carried into effect by the Government of Newfoundland, belong to the office of the Attorney General and Solicitor-General.

(f) He shall advise the heads of the several departments of Government upon all matters of law connected with such departments respectively.

(g) He shall be charged with the settlement of all instruments issued under the Great Seal of Newfoundland.

(h) He shall have the superintendence of prisons and other places of confinement and houses of correction within Newfoundland, except as otherwise provided in any other Act.

(i) He shall have the regulation and conduct of all litigation for and against the Crown or any public department in respect of any subjects within the authority or jurisdiction of the Legislature.

(j) He shall be charged generally with such duties as may be at any time assigned by law or by the Lieutenant-Governor in Council to the Attorney General.”⁴

In Ontario, the powers conferred under subsection (h) are exercised by the Minister of Reform Institutions. The language of subsection (e), which preserves all the traditional powers of the Attorney General, is important and is specifically applicable to Newfoundland. The language of the Nova Scotia Act⁵ and the Quebec Act⁶ should be considered in formulating appropriate language to be used in a similar statute in Ontario. The provisions of the Nova Scotia Act, to which we refer, are:

“4. The functions, powers and duties of the Attorney General shall be the following: . . .

(f) he shall have the functions and powers which belong to the office of the Attorney General of England by law or

⁴*Ibid.*, s. 9.

⁵Public Service Act, R.S.N.S. 1954, c. 240.

⁶Attorney-General's Department Act, R.S.Q. 1964, c. 19.

usage in so far as the same are applicable to this Province, and also the functions and powers which previous to the coming into force of [the B.N.A. Act, 1867] belonged to the office of Attorney General in the Province of Nova Scotia and which under the provisions of that Act are within the scope of the powers of the government of the province.”⁷

The Quebec Act recognized the necessity not only of preserving the functions and powers of the office of Attorney General and Solicitor General of England, but also those of offices in the late Province of Canada. It reads:

“1. The function and powers of the Attorney General are the following:

(1) He has the functions and powers which belong to the office of Attorney-General and Solicitor General of England, respectively, by law or usage, in so far as the same are applicable to this Province, and also the functions and powers, which, up to the Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North America Act, 1867, are within the powers of the Government of this Province.”⁸

In formulating an Attorney General Act for Ontario, not only should the powers that are exercised by the office after the Act of Union be perpetuated, but those exercised by the Attorney General of Upper Canada should likewise be perpetuated, in so far as they are within the scope of the powers of the government of the Province. Express provision should be made that the Attorney General should be a member of the Bar of Ontario.

We think that there is a decided advantage in having an Attorney General Act which specifically sets out the functions and duties of the holder of the office. Such a statute would leave no doubt as to who is responsible for the legal affairs of the Province, and who is accountable if legislation should be introduced which fails adequately to safeguard civil rights. The office of Attorney General has by tradition been a very high office in democratic countries. Throughout past years there has been some tendency to dilute the importance of the

⁷R.S.N.S. 1954, c. 240, s. 4.

⁸R.S.Q. 1964, c. 19, s. 1.

office by diffusing through departmental solicitors duties that pertain to the Attorney General alone, as the law officer responsible to the Crown in the protection of the subjects of the Crown. This dilution should be stopped. The office should be restored to its traditional authority, responsibility and dignity. Its occupant should rank in precedence next to the Prime Minister, but unlike the Prime Minister the holder of the office should be permitted to divorce himself as much as possible from ordinary political controversy. It is essential that he should be accountable to the Legislature as a responsible minister, but confidence in the independent performance of his duties will be enhanced if he is not required to engage in the heat of political battle and partisan controversy.

SUMMARY OF RECOMMENDATIONS ON THE ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

1. Crown attorneys should not be permitted to collect fees. They should all be paid a definite salary.
2. The salaries of crown attorneys should be increased, relative to the authority and responsibility of the office.
3. The Province should be divided into districts with a Senior Crown Attorney appointed for each district who would be responsible, under the Senior Crown Attorney for the Province, to the Director of Public Prosecutions.⁹
4. There should be a legislative branch of the Attorney General's Department.
5. Strict procedure should be adopted for the preparation of legislative bills. While the departmental minister should be responsible for the social policy of all bills, it should be clearly recognized that the Attorney General is constitutionally responsible for the legal policy of all bills.
6. When a department proposes new legislation, a memorandum embodying the principles of legislation should be submitted for approval to the Cabinet so that the government's policy may be determined before the drafting begins.

⁹Since this was written, some steps have been taken by the Attorney General along the lines contained in this recommendation.

7. When government policy has been determined, the preparation of the draft bill should be undertaken by the legislative branch, under the control and supervision of the Attorney General. The drafting of the bill should be undertaken as early as possible. It should be carried on by the draftsman assigned by the legislative branch of the Attorney General in consultation with the administrative officials and the legal officer of the department concerned. Instructions on specific questions as to the social policy of the statute should come from the officers of the department concerned, subject to the control and direction of the minister; but the Attorney General should control and direct the general legal policy to be applied in the preparation of the draft bill.
8. The legal services of the government should be reorganized so that all legal services come under the direction of the Attorney General.
9. Legal officers in departments should have training in the Attorney General's Department.
10. There should be an Attorney General Act expressly defining the functions and role of the Attorney General in government and requiring him to submit an annual report to the Legislature.
11. Statutory provision should be made that the Attorney General must be a member of the Bar of Ontario.

